

COMMENTS

THE TEXAS TWO-STEP: THE CRIMINALIZATION OF TRUANCY UNDER THE TEXAS “FAILURE TO ATTEND” STATUTE

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“Crime is a social problem, and education is the only real
deterrent. Look at all of us in prison: we were all truants and
dropouts, a failure of the education system. Look at your
truancy problem, and you’re looking at your future prisoners.
Put the money there.”

Wilbert Rideau¹

I. INTRODUCTION

On July 27, 2010, the American Civil Liberties Union (ACLU) brought suit in federal court against Hidalgo County alleging that the rights of dozens of the county’s teenagers had been violated.² The teens were incarcerated for failing to pay off outstanding fines resulting from school-attendance issues, as well as other school-related offenses; in some cases, causing the teens to drop out of school entirely.³ Texas law protects a minor from incarceration for crimes committed during one’s youth (including school attendance issues); however, once he or she turns seventeen, an arrest warrant may be issued for an individual who fails to pay

1. Richard Woodbury & Wilbert Rideau, *Wilbert Rideau, A Convict’s View: People Don’t Want Solutions*, TIME MAG., Aug. 23, 1993, available at <http://www.time.com/time/magazine/article/0,9171,979066,00.html>.

2. Jeremy Roebuck, *ACLU Sues County, Embattled JP Over Truancy Jailings*, MONITOR, July 28, 2010, available at 2010 WLNR 14972564.

3. *Id.*

finer on pending cases or misses court-scheduled appearances.⁴ While the key issue in this case involves the constitutionality of jailing people without verifying their ability to pay or offering community service alternatives,⁵ this case also serves to illuminate the disturbing issues surrounding Texas' criminalization of truancy through its unique Failure to Attend School (FTAS) statute.⁶

Under the school attendance statute, when a student misses ten or more days without excuse (or parts of days) during a six-month period the district *must* "file a complaint against the student or the student's parent or both in a county, justice, or municipal court . . . or refer the student to a juvenile court for [C]onduct [I]ndicating a [N]eed for [S]upervision" (CINS) under the Family Code §51.03.⁷ If a student fails to attend school without excuse on three or more days within a four-week period, the school *may* file a complaint against the student, parent, or both in a justice or municipal court.⁸ Both truancy and FTAS cover the same conduct, but one is a civil offense and the other is a criminal offense. Essentially, Texas has created a dual-system of justice with FTAS offenses being handled in a criminal justice or municipal court, and its identical truancy offense being handled in a juvenile court; both for identical conduct, but each with drastically different procedures, protections, and consequences for children. Habitual truancy is an offense that is more appropriately handled in a juvenile court with CINS as a last resort, where students and their families have access to services that will aid in getting the student back on track. Tragically, more students are cited under FTAS and sent to a municipal or justice court to face fines and criminal sanctions that do little to correct the behavior.

Consider for example, the case of Elizabeth Diaz, a student at Edinburg Consolidated Independent School District and a named plaintiff in the class action suit against Hidalgo County.⁹ After missing school

4. TEX. CRIM. PROC. CODE ANN. § 45.045 (West 2006); Jeremy Roebuck, *ACLU Sues County, Embattled JP Over Truancy Jailings*, MONITOR, July 28, 2010, available at 2010 WLNR 14972564.

5. *C.f.* *Bearden v. Georgia*, 461 U.S. 660, 664–69 (1983) (discussing precedent defining the rights of indigent probationers and explaining that it would be "fundamentally unfair" to deny a probation without examining adequate alternatives to fine payment).

6. TEX. CRIM. PROC. CODE ANN. § 45.045 (West Supp. 2010).

7. TEX. EDUC. CODE ANN. § 25.094 (West 2006) (detailing the elements of Failure to Attend); TEX. FAM. CODE § 51.03 (b)(B)(2) (West Supp. 2010) (outlining the elements for Delinquent Conduct and Conduct in Need of Supervision (CINS) offenses including missing 10 or more days of school within a six month period or 3 days in a four week period).

8. TEX. EDUC. CODE ANN. § 25.0951(a)–(b) (West Supp. 2010) (regulating permissible and mandatory complaints by a school district).

9. Class Action Complaint at 25, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 26, 2010); *ACLU of Texas Sues Hidalgo County, Challenges "Debtor's*

due to several medical conditions, she was called into court, fined \$1,603, and told if she could not immediately pay, she would have to serve jail time.¹⁰ Unable to pay these excessive fines, Elizabeth served eighteen days in jail.¹¹ As a result of the absences she accrued during her incarceration, Elizabeth revoked her enrollment; she also missed the administration of the Texas Assessment Knowledge and Skills (TAKS) test¹²—a requirement for graduation.¹³ Consequently, she did not graduate high school. The system allegedly designed to keep kids in school quite effectively kept her out of school, years after her attendance had improved.¹⁴

Unfortunately, such nonsensical stories are all too pervasive. In Dallas, truant students face similar struggles under an ineffective and confusing system; often receiving an extra dose of *contempt*.¹⁵ One judge recently was reported to have threatened a student with jail-house rape saying the boy did not “have to worry about being disciplined by his mother—but rather by his ‘boyfriend in county jail.’”¹⁶ The judge further castigated another student saying, “You’re not very good at this. You need to find another line of work”¹⁷—rehabilitation at its finest. This court had no problem chastising and fining parents either.¹⁸

Prison” for Truant Teens, AM. CIVIL LIBERTIES UNION OF TEX. (July 27, 2010), <http://www.aclutx.org/2010/07/27/place-holder-headline-4/>.

10. *Id.* at 25, 27–29.

11. *ACLU of Texas Sues Hidalgo County, Challenges “Debtor’s Prison” for Truant Teens*, AM. CIVIL LIBERTIES UNION OF TEX. (July 27, 2010), <http://www.aclutx.org/2010/07/27/place-holder-headline-4/>.

12. *Id.*

13. TEX. EDUC. CODE ANN. § 39.025(a) (West Supp. 2010) (requiring passage of “end-of-course assessment instrument” in order to receive high school diploma); *see also id.* § 39.023 (mandating creation of and general requirements for the statewide assessment of academic achievement). Criterion-referenced assessments are administered in the following areas:

(1) mathematics, annually in grades three through seven and in grade eight with the aid of technology on any assessment instrument that includes algebra; (2) reading, annually in grades three through eight; (3) writing, including spelling and grammar, in grades four and seven; (4) social studies, in grade eight; (5) science, in grades five and eight; and (6) any other subject and grade required by federal law.

Id. § 39.023(a)(1)–(6).

14. *ACLU of Texas Sues Hidalgo County, Challenges “Debtor’s Prison” for Truant Teens*, AM. CIVIL LIBERTIES UNION OF TEX. (July 27, 2010), <http://www.aclutx.org/2010/07/27/place-holder-headline-4/>.

15. Tawnell D. Hobbs, *Dallas Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, Feb. 3, 2009, available at 2009 WLNR 1992915.

16. *Id.*

17. *Id.*

18. *Id.*

Another student, Ladarrius Gunn, was eighteen when he was first ordered to appear before a justice of the peace for FTAS and fined \$250.¹⁹ When a knee injury occurred during the homecoming football game ending Ladarrius Gunn's football career, he gave up on school and began skipping classes.²⁰ Then the school seemingly gave up on him and cited him for FTAS.²¹ Ladarrius, an eighteen-year-old senior, was ordered to pay a \$250 fine and attend Saturday school for FTAS.²² He went to Missouri and graduated high school; and upon his return to Texas, he was arrested and given the option to "pay or lay"—stay in jail for five days or pay the \$250 fine.²³

Ashley Walden was issued a single citation for FTAS while a senior at Dripping Springs High School.²⁴ She was fined \$10,500, but received a deferred disposition order with conditions of twenty hours community service and submission to random drug testing.²⁵ She was required to adhere to a 6:00 p.m. curfew and not allowed to attend her senior prom.²⁶ After failing a drug test, she was confined for forty-eight hours.²⁷ Again, the system not only fails to solve the school attendance problem, it serves to further the alienation and criminalization of children who cannot afford to pay and who are not fully aware of the risks at stake.

The well-documented phenomenon of the "School-to-Prison Pipeline," drives academically undesirable children out of school.²⁸ Through unrea-

19. Forrest Wilder, *School House Crock: Why Texas is Prosecuting Adults for Dropping Out?*, TEX. OBSERVER, March 19, 2010, available at 2010 WLNR 8431883.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Walden v. Baker*, No. 03-03-00253-CV, 2005 WL 3440778 (Tex. App.—Austin Dec. 15, 2005 no pet.), (mem. op.).

25. *Id.*

26. *Id.*

27. *Id.*

28. TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: SCHOOL EXPULSION, THE PATH FROM LOCKOUT TO DROPOUT 42 (2010), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=380&Itemid= (discussing the "School-to-Prison Pipeline"). The "School-to-Prison Pipeline" characterizes "a disturbing pattern of school disciplinary problems escalating from suspension to removal from school, juvenile justice system involvement, and school dropout. Numerous studies by national experts in the fields of education, criminal justice, and mental health have established a link between school discipline, school dropout rates and incarceration." *Id.* at 1. This link holds true in Texas as it is estimated that over eighty percent of adult inmates are high school dropouts. *Id.* The definition of "push-out" varies. Some define it as the process in which students are illegally prevented from attending school. ADVOCATES FOR CHILDREN OF N.Y., SCHOOL PUSHOUT: WHERE ARE WE NOW? (2008), http://www.advocatesforchildren.org/pubs/pushout_update_2008.pdf. However, other sources refer to it as a situation in which a student leaves school before graduation through the encouragement or force of

sonably severe discipline and zero-tolerance practices, tougher graduation²⁹ and attendance requirements,³⁰ subtle discouragement regarding a student's ability to succeed in school, and in too many cases court-referrals, children are often left with few alternatives but to give up on their education.³¹ Truancy prosecution under the FTAS statute is but one manifestation of this phenomenon and is the primary focus of this Comment. There is little doubt that truancy is the first indicator of trouble for our children; giving up on education and leaving school is the most obvious and probable outcome of truancy.³² While dropping out is alarming in and of itself, the Office for Juvenile Justice and Delinquency Prevention (OJJDP) reports strong links between truancy and more serious forms of delinquency.³³ Current research extensively confirms high school dropouts are also at a long-term disadvantage compared to their graduating counterparts.³⁴ High school drop-outs are more likely to be unemployed, earn significantly less money, and are more likely to need public assistance.³⁵ Minority students, in particular, face even more overwhelming odds as "[h]igh school completion rates were consistently lower among young Hispanic adults than among both whites and blacks be-

the school. Tamar Lewin & Jennifer Medina, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES (July 31, 2003), available at 2003 WLNR 5207724.

29. TEX. EDUC. CODE ANN. § 28.025(b-1)(1) (West Supp. 2010) (mandating that, under the recommended high school program, students need to complete four credits for each subject in the core curriculum; thereby making all four core subjects a requirement for each year of high school).

30. *Id.* § 25.092. In order to receive credit in a class, students must be in attendance for no fewer than "ninety percent of days the class is offered." *Id.*; see also *id.* § 25.094 (West 2006) (defining Failure to Attend School as missing "10 or more days or parts of days within a six-month period in the same school year or on three or more days or parts of days within a four-week period").

31. Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 13 DUKE FORUM FOR L. & SOC. CHANGE 17, 22 (2010), available at <http://ssrn.com/abstract=1675968> (discussing the legal consequences of truancy and delinquency).

32. U.S. DEP'T OF EDUC., MANUAL TO COMBAT TRUANCY 13 (1996), <http://www.eric.ed.gov/PDFS/ED397526.pdf>.

33. MYRIAM L. BAKER ET AL., OFFICE OF JUV. JUST. & DELINQ. PREVENTION, TRUANCY REDUCTION: KEEPING STUDENTS IN SCHOOL 1 (2001), <http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf> (drawing attention to the correlation between truancy and criminal acts such as, theft, burglary, vandalism, and gang activity).

34. U.S. DEP'T OF EDUC., MANUAL TO COMBAT TRUANCY 1 (1996), <http://www.eric.ed.gov/PDFS/ED397526.pdf>.

35. MICHELLE M. ENGLUND ET AL., EXCEPTIONS TO HIGH SCHOOL DROPOUT PREDICTIONS IN A LOW-INCOME SAMPLE: DO ADULTS MAKE A DIFFERENCE? (March 1, 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2749274/>.

tween 1975 and 2006.”³⁶ During the 1991 to 2007 time period, completion rates among Hispanics fluctuated between approximately 57% in 1991 to 73% in 2007.³⁷

The completion rates in Texas are even more precarious.³⁸ In 2003, Texas had the lowest percentage of high school graduates who were at least twenty-five-years-old.³⁹ The statistics for minorities in Texas are even more troublesome: 50% of the Hispanic students and 46% of African-American students entering the ninth grade will drop out of school before reaching their senior year.⁴⁰ The disparity between White students and African-American and Hispanic students is even more alarming. Together African-Americans and Hispanics are projected to comprise approximately two-thirds of the Texas population by 2040.⁴¹ The Bush School of Government and Public Service at Texas A&M predicts the cost of Texas dropouts from the 2012 class alone to be between approximately \$5.5 and \$10 billion in outright expenses, lost income, welfare benefits, and lost sales tax revenue.⁴²

Habitual truancy encompasses a diverse group of students, but they do share a common characteristic: their attendance is impacted by various, if not numerous, interrelated causal factors.⁴³ Many students have chronic health problems; others face family and social challenges including caring for younger siblings or helping supplement a family income⁴⁴ while others simply cannot afford presentable clothing, which is necessary to attend

36. OFFICE OF JUST. PROGRAMS, OFFICE OF JUV. JUST. & DELINQ. PREVENTION, STATISTICAL BRIEFING BOOK (April 26, 2010), available at <http://ojjdp.ncjrs.gov/ojstatbb/population/qa01501.asp?qaDate=2007>.

37. *Id.*

38. NAT'L CTR FOR EDUC. STATS., DIGEST OF EDUCATIONAL STATISTICS (2009), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_106.asp; see also NEELEY v. W. ORANGE-COVE CONSOL. INDEP. SCH. DIST., 176 S.W.3d 746, 769 (Tex. 2005) (discussing the effectiveness and constitutionality of public school funding in Texas).

39. NEELEY v. W. ORANGE-COVE CONSOL. INDEP. SCH. DIST., 176 S.W.3d 746, 769 (Tex. 2005).

40. *Id.*

41. *Id.*

42. ROMAN ALVAREZ ET AL., THE BUSH SCH. OF PUB. GOV'T & PUB. SERV., TEX. A&M UNIV., THE ABCD'S OF TEXAS EDUCATION: ASSESSING THE BENEFITS AND COSTS OF REDUCING THE DROPOUT RATE vii–viii (2009), available at <http://bush.tamu.edu/research/capstones/mpsa/projects/2009/TheABCDs.pdf>.

43. U.S. DEP'T OF EDUC., MANUAL TO COMBAT TRUANCY 3 (1996), available at <http://www.eric.ed.gov/PDFS/ED397526.pdf>; *Truancy: A Serious Problem for Students, Schools, and Society*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/print/admins/lead/safety/training/truancy/problem.html#day3> (last modified May 12, 2009).

44. *Truancy: A Serious Problem for Students, Schools, and Society*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/print/admins/lead/safety/training/truancy/problem.html#day3> (last modified May 12, 2009).

school.⁴⁵ Many other students experience problems in school such as bullying or are struggling academically.⁴⁶ One fact remains clear: “the causes of most truant behavior cannot be so neatly categorized; instead, students begin to miss individual classes and full days of school due to several interrelated problems that—without intervention—will likely become increasingly serious over time.”⁴⁷ Truancy should not be deemed a crime. Rather, truancy is a community-wide issue, and resources from all facets of the community are needed to help young people overcome the many obstacles that can interfere with regular school attendance.⁴⁸

The current dual system of truancy in Texas is confusing at best and serves to create inane results at times. While having the best of intentions, Texas is not only failing to reduce the truancy problem, but is simultaneously creating a new class of criminals; further burdening an already over-stretched judicial system.⁴⁹ *The Dallas Morning News* reported: “truancy cases sat in [municipal and justice] courts an average of 73 days before a hearing was conducted.”⁵⁰ In some cases, hearings were not conducted for up to 160 days—when the academic year is comprised of only 180 days in total.⁵¹

A primary reason for this backlog of hearings is a common practice known as “batching,” where courts are showered with multiple citations against the same student, all at once.⁵² Frequently, schools will wait until children have accumulated upwards of sixty unexcused absences before filing.⁵³ As a result, municipal courts often have to suspend the cases until the following school year, creating further congestion in the courts

45. See *New Clothes Aid a Fight on Truancy*, N.Y. TIMES (Apr. 7, 1988), available at 1988 1325036; see also *Truancy: A Serious Problem for Students, Schools, and Society*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/print/admins/lead/safety/training/truancy/problem.html#day3> (last modified May 12, 2009).

46. U.S. DEP’T OF EDUC., MANUAL TO COMBAT TRUANCY 3 (1996), available at <http://www.eric.ed.gov/PDFS/ED397526.pdf>; *Truancy: A Serious Problem for Students, Schools, and Society*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/print/admins/lead/safety/training/truancy/problem.html#day3> (last modified May 12, 2009).

47. *Truancy: A Serious Problem for Students, Schools, and Society*, U. S. DEP’T OF EDUC., <http://www2.ed.gov/print/admins/lead/safety/training/truancy/problem.html#day3> (last modified May 12, 2009).

48. U.S. DEP’T OF EDUC., MANUAL TO COMBAT TRUANCY 2–4 (1996), <http://www.eric.ed.gov/PDFS/ED397526.pdf>.

49. See Tawnell D. Hobbs, *Dallas School District Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, Feb. 3, 2009, available at 2009 WLNR 1992915.

50. William R. Capps, *The New Face of Truancy*, THE SCHOOL ADMIN., April 1, 2003, available at 2003 WLNR 13239762.

51. *Id.*

52. CALLIE ENLOW, *Last Ditch Effort*, SAN ANTONIO CURRENT, July 28, 2010, available at <http://www.sacurrent.com/news/story.asp?id=71379>.

53. *Id.*

and compounding the issues for the student.⁵⁴ The courts have a backlog of 600 cases from Northside Independent School District (NISD), and a few hundred from San Antonio Independent School District alone.⁵⁵ This process of batching combined with the influx of cases now being filed has caused additional municipal courts, dedicated solely to hearing FTAS cases, to spring up all across the state.⁵⁶ Furthermore, students may continue to miss classes while their cases sit untouched by the court. Rather than intervening when a child misses ten days, children face the judge after they have sixty days of absences—when it is far too late for a child to recover educationally, and the judicial penalties can be significantly more severe.

When cases are heard, some judges who lack resources are imposing fines and extended jail time,⁵⁷ which simply exacerbates the original attendance issue and leaves some children with no alternative but to drop out of school. Although no state-wide statistics examining the extent of truancy are available, some municipal courts and school districts do keep their own statistics.⁵⁸ Between 2001 and 2007, Texas schools issued over 120,000 tickets to children for FTAS.⁵⁹ According to the Texas Education Agency (TEA), truancy in the Dallas Independent School District (DISD) rose from 5,491 to 7,920 in 2010 alone.⁶⁰ Parents are by no means exempt from accountability. When citations against parents are

54. While the Education Code mandates districts file petitions within ten days after the tenth absence, no such filing requirement exists for students who accumulate three absences within a four-week period, although districts may file a claim on that basis at their discretion. *Id.* When school districts miss the filing deadline, there are no sanctions. *Id.* In 2007, Attorney General of Texas Greg Abbott stated, “other than requiring a court to dismiss the complaint or referral, the Education Code imposes no penalties on a school district that fails to file a complaint or referral within ten school days of the student’s 10th unexcused absence.” *Id.*

55. *Id.*

56. See *id.*; see also Tawnell D. Hobbs, *Dallas School District Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, Feb. 3, 2009, available at 2009 WLNR 1992915 (attributing a centralized computer system accounting for truantries as a reason for the spike in truancy cases).

57. See, e.g., Class Action Complaint, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. July 26, 2010).

58. TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 68 (2010) available at http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

59. *Id.* at 77. TEA does not require school districts to report citation data so the actual number of FTAS issued citations is likely to be significantly higher. *Id.* at 78. This number is based on the limited data that provided by the Texas Office of Court Administration (TOCA). *Id.* at 1.

60. Tawnell D. Hobbs, *Dallas School District Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, Feb. 3, 2009, available at 2009 WLNR 1992915.

included, DISD files 18,000–20,000 attendance related cases per year.⁶¹ In 2008, Fort Worth Independent School District (FWISD) filed 1,059 cases against parents; 433 involved the imposition of fines.⁶² In an effort to address this problem, the City of Fort Worth, in collaboration with its school district, was the first in Texas to create a separate municipal student attendance court nine years ago.⁶³ The City of San Antonio has just one municipality and recently assigned a municipal judge exclusively to the FTAS juvenile docket.⁶⁴ In too many instances across the state, students can be incarcerated for what was intended to be *fine-only*, school-related misdemeanor charges.⁶⁵

The aim of this Comment is to create a legislative paradigm shift by viewing status offenders,⁶⁶ particularly habitual truants, as “children who committed no crime but who need a helping hand in getting back on track.”⁶⁷ We must ensure the Texas juvenile justice system is fair, humane, and effective. This comment offers two distinct approaches to the problem—decriminalization and intervention.

First, the Texas Legislature should decriminalize school-related attendance issues and give local control over school matters back to the ex-

61. See Shelton Stogner, *Dallas Challenge Truancy Enforcement Center*, TRUANCY, http://www.truants.org/dallas_history.htm (last visited Jan. 16, 2010).

62. Tawnell D. Hobbs, *Dallas School District Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, Feb. 3, 2009, available at 2009 WLNR 1992915.

63. Truancy Court/School Attendance Court, FT. WORTH INDEP. SCH. DIST., http://www.fwisd.org/attendance/Pages/truancy_court.aspx (LAST VISITED JAN. 16, 2010).

64. Lynn Brezosky, *Valley JP Creates a Truancy Ruckus*, SAN ANTONIO EXPRESS-NEWS, Aug. 8, 2010, available at 2010 WLNR 16011121.

65. TEX. PENAL CODE § 12.23 (West 2003) (Class C Misdemeanors are fine-only offenses); see also Shelton Stogner, *Dallas Challenge Truancy Enforcement Center*, TRUANCY, http://www.truants.org/dallas_history.htm (last visited Jan. 16, 2010).

66. TEX. FAM. CODE ANN. § 51.02(15) (West Supp. 2010) (defining status offender as “a child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult”). Misconduct that is considered illegal for children *only* is considered a status offense. Such conduct includes: habitual truancy, running away from home, incorrigibility, curfew violations, and tobacco and alcohol use. Nancy Gannon Hornberger, *Improving Outcomes for Status Offenders in the JJDP A Reauthorization*, JUV. & FAM. JUST. TODAY, Summer 2010, at 15, 16, available at http://www.juvjustice.org/media/announcements/announcement_link_156.pdf.

67. Anne Salsich, *Adolescent Behavior Is Not A Crime*, VERA INST. OF JUST. (Sept. 10, 2009), <http://www.vera.org/content/adolescent-behavior-not-crime>; see also Emily Ray, Comment, *Waiver, Certification, and Transfer of Juveniles to Adult Court: Limiting Juvenile Transfers in Texas*, 13 SCHOLAR 317, 340 (2011).

[J]uveniles frequently behave impetuously, and make ill-considered decisions . . . [and] minors are especially vulnerable to bad influences . . . youths actually have less control over their environments than adults, and [] are less able to get themselves out of potentially harmful or “criminogenic” settings.

Id. (footnotes omitted).

perts—schools. We can no longer continue to respond to the adolescent behavior of skipping school as if it were a criminal offense and simultaneously create a whole new class of criminals. Society would find it absurd if a parent simply called the police to remove their child's gaming system if he or she misbehaved; it is equally illogical to send a child to criminal court for a school-based issue such as missing class.

At the very least, the Texas legislature must limit the use of FTAS citations by requiring schools to effectively employ community-based diversion strategies prior to issuing citations for FTAS offenses. Texas must divert these status offenders from court by offering support, guidance, and multi-faceted research-based intervention programs.

Finally, municipal and justice courts must employ further court diversion strategies prior to hearing cases relating to school attendance. By failing to employ diversion strategies and issuing boiler-plate court orders that mandate a child's attendance without addressing the underlying issues, we are failing the very children who need the most assistance.

The first part of this Comment sets the historical foundation for effective truancy legislation and discusses the historical and the legal framework for truancy laws in Texas. Part Two examines the current statutes, trends, cases, and unintended legal effects of the current legislation in Texas. Additionally, Part Three of this Comment aims to highlight effective non-litigation strategies that school districts, educators, and the courts can utilize to retain students through graduation. Finally, Part Four points out model programs that advocates and educators can employ in order to effectively divert and prevent court intervention and keep our kids in school.

II. THE CREATION OF THE JUVENILE JUSTICE SYSTEM

A. *Historical Background of the Juvenile Justice System*

One must understand how the juvenile justice system in the United States has progressed in order to comprehend the current conflict regarding the direction of Texas's juvenile justice system; particularly as it relates to school attendance issues. Prior to the early 1900s, society's views began to experience a shift regarding juvenile delinquents and reformers pushed to rehabilitate rather than punish children.⁶⁸ In 1899, a juvenile justice system was established to reform policies surrounding juveniles.⁶⁹ The aim was to protect the due process rights of children and to divert

68. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 663–64 (2005).

69. Salma Safiedine, *Bad Girls Do Cry: Girls in the Juvenile Justice System, Offenders or Victims?*, JUV. JUST. COMM. NEWSL., July 2010, available at <http://new.abanet.org/sections/criminaljustice/PublicDocuments/jjSafiedine.doc>; Committee Newsletter 1 (July

them from jail by “trad[ing] punishment for accountability and to emphasize rehabilitation and treatment of children.”⁷⁰ Society began to realize that rehabilitating young offenders before they became career criminals was a more comprehensively beneficial approach, and began creating reform homes for troubled youth.⁷¹ The state assumed the responsibility of the parent until the child began to walk the straight and narrow, or at least until they became adults.⁷²

Informal courts designed specifically for juveniles sprung up across the nation giving judges the authority to punish, or to rehabilitate and provide treatment.⁷³ Additionally, juvenile courts desired to make their civil proceedings non-adversarial rather than simply juvenile versions of adult criminal courts.⁷⁴ By the 1960s, juvenile courts had jurisdiction over most, if not all, cases involving children under the age of eighteen, and transfers into the adult criminal system could only be made through a waiver by the juvenile court.⁷⁵ However, in 1967 the Supreme Court required juvenile courts to provide due process of law to juveniles during all stages of proceedings.⁷⁶ A year later in 1968, Congress passed the Juvenile Delinquency Prevention and Control Act (JDPCA), which encouraged states to work on a community level to deter juvenile delinquency and recommended that states deal with status offenses outside of the court jurisdiction.⁷⁷ The Act was later replaced by the Juvenile Justice and Delinquency Prevention Act (JJDP Act) of 1974, which required states, who wished to obtain federal funding made available by this act, to

2010), available at <http://new.abanet.org/sections/criminaljustice/Pages/JJNewsJuly2010.aspx>.

70. Salma Safiedine, *Bad Girls Do Cry: Girls in the Juvenile Justice System, Offenders or Victims?*, JUV. JUST. COMM. NEWSL., July 2010, available at <http://new.abanet.org/sections/criminaljustice/PublicDocuments/jjSafiedine.doc>.

71. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 664 (2005).

72. Christine Rinik, *Juvenile Status Offenders: A Comparative Analysis*, 5 HARV. J.L. PUB. POL’Y 151, 158 (1982).

73. See C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 667, 668 (2005); see also Emily Ray, Comment, *Waiver, Certification, and Transfer of Juveniles to Adult Court: Limiting Juvenile Transfers in Texas*, 13 SCHOLAR 317 (2011).

74. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 667–84 (2005). While under this system, children could potentially lose their liberty through incarceration and secured detention, children were not afforded constitutional due process—including a right to an attorney in juvenile proceedings. *Id.* at 669–72.

75. *Id.* at 669–73, 677.

76. See *id.* at 672; see generally *In re Gault*, 387 U.S. 1 (1967).

77. Juvenile Delinquency Prevention and Control Act of 1968, Pub. L. No. 90-445, § 82 Stat. 462.

“discourage the use of secure incarceration and detention” facilities and separate juvenile offenders from adult offenders.⁷⁸ But in 1980, the JJDPa was amended to allow for secure detention of status offenders who violate a valid court order. In 2001, Texas House Bill 1118 was passed to limit use of the Valid Court Order (VCO) exclusively to juvenile courts.⁷⁹ Some states, like Connecticut, have realized the negative impact of the VCO and have eliminated its use in status offense cases arguing these “children need treatment and services, not incarceration, to overcome the challenges they face,”⁸⁰ while other states, like New York, are actively seeking to expand its use.⁸¹

B. *The Rise of the “Get Tough” Approach to Juvenile Crime*

Starting in the late 1980s, juvenile crimes spiked.⁸² Even though it began to decline, state legislatures, responding largely out of fear, began the “get tough” on crime wave including transferring juveniles to the adult system of justice.⁸³ Furthermore, the series of school shootings in the late

78. Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1121 1122 (mandating status offenders not to be placed in detention or correctional facilities); Clair Shubik & Jessica Kendall, *Rethinking Juvenile Status Offense Laws: Consideration for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 FAM. CT. REV. 384, 385 (2007). Under the JJDPa, juvenile judges can issue Valid Court Orders (VCOs) for status offenses. Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE FORUM FOR L. & SOC. CHANGE 17, 25 (2010), available at <http://ssrn.com/abstract=1675968>. This empowers judges to place conditions on students who are found to be guilty and enforce the orders through contempt and incarceration, regardless of how impossible the terms of the original order are. *Id.*

79. Claire Shubik & Jessica Kendall, *Rethinking Juvenile Status Offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 FAM. CT. REV. 384, 389 (2007) (allowing the use of the VCO exception in juvenile courts).

80. *Id.* Like Texas, schools in Washington now must file a truancy petition with Juvenile Court when a child has more than five unexcused absences in a month or ten in a school year. Mistee R. Pitman, *The Becca Bill: A Step Toward Helping Washington Families*, 34 GONZ. L. REV. 385, 409 (1998-99) (the Becca Law was enacted by the Washington State Legislature to allow for schools and courts to keep children in school by holding them in contempt). Contempt under this law can result in a fine of up \$100 or confinement. *Id.*

81. Claire Shubik & Jessica Kendall, *Rethinking Juvenile Status Offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 FAM. CT. REV. 384, 389 (2007) (allowing the use of the VCO exception in juvenile courts).

82. Jennifer M. O'Connor & Lucinda K. Treat, Note, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1305-06 (1996).

83. *Id.* at 1305 (state legislatures across the country began tougher responses and sentences in response to juvenile crime). Through a process called certification or waiver, juvenile court judges have the power to waive jurisdiction and transfer juveniles cases to

1990s, including the events at Columbine High School, caused a widespread panic regarding an anticipated emergence of a new class of juvenile offender: the super-predator.⁸⁴ In response, Texas, like many other states, adopted a “get tough” approach to juvenile offenders in which the original goal of rehabilitation became secondary to punishment.⁸⁵ Consequently, Texas enacted Chapter 37 of the Education Code,⁸⁶ a controversial statutory scheme which created a major change in the state’s policy governing student discipline by adopting a criminal model.⁸⁷ In effect, Chapter 37 caused local control of discipline in our schools to fly out the schoolhouse window and straight to the courthouse.⁸⁸ Issues that were typically addressed by detention and in-school suspension by school administrators suddenly became criminal matters for the courts. Texas transferred the more common milieu of children’s transgressions regarding alcohol, tobacco, curfew, and FTAS violations from the civil juvenile dockets to the criminal municipal and justice courts.⁸⁹ Although the super predator never materialized, the collateral damage has been done—criminal law and student discipline are now heavily intertwined in

adult court when the charge is considered serious. See Emily Ray, Comment, *Waiver, Certification, and Transfer of Juveniles to Adult Court: Limiting Juvenile Transfers in Texas*, 13 SCHOLAR 317 (2011). While initially transfer was rare, most states, including Texas, have codified the ability to transfer juvenile offenders to the adult criminal system through waiver or certification. *Id.*

84. OFFICE OF JUV. JUST. & DELINQ. PREVENTION, 1999 NAT’L REP. SERIES, JUVENILE JUSTICE BULLETIN: CHALLENGING THE MYTHS, (Feb. 2000), http://www.ncjrs.gov/html/ojjdp/jjbul2000_02_2/chal1.html (defining juvenile super-predators).

85. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children’s Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

86. TEX. EDUC. CODE ANN. § 37 (West 2006); Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children’s Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010). Chapter 37 of the Education Code establishes the statutes related to student discipline, law and order in public schools, and assists schools in determining disciplinary responses to student behavior both on and off campus. *Id.* Chapter 37 is controversial and research indicates it is responsible for children being charged for criminal offenses such as falling asleep in class, chewing gun, and other minor disruptions. *Id.*

87. Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN’S J. LEGAL COMMENT. 73, 89, 90 (2006).

88. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children’s Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010) (quoting JIM WALSH ET AL., *THE EDUCATOR’S GUIDE TO TEXAS SCHOOL LAW* 306 (6th ed. 2005)).

89. *Id.*

Texas.⁹⁰ This statutory scheme has in effect criminalized “status offenses” such as skipping school.⁹¹

III. COMPULSORY ATTENDANCE IN TEXAS: LEGISLATIVE SCHEMES

School attendance was made compulsory in Texas in 1916 and required children between eight and fourteen years of age to attend public school for 60 days during the school year, 80 days the following year, and 100 days each year thereafter.⁹² Parents (or persons acting in the parental role) were responsible for ensuring that children complied,⁹³ and children who declined to attend school could be adjudicated by a juvenile court as habitual truants.⁹⁴

Today, Texas schools must operate for seven hours a day, 180 days per year.⁹⁵ Under current law, “a child who is at least six years of age, or who is younger than six years of age and has previously been enrolled in first grade, and who has not yet reached [his or her] eighteenth birthday shall attend school.”⁹⁶ In addition, to receive credit for a course, students must attend “at least ninety percent of the days the class is offered” regardless of whether the absence is excused or not.⁹⁷ A student who *voluntarily* attends school after his or her eighteenth birthday is required to comply with the current compulsory attendance laws.⁹⁸ If a student who is eighteen or older accumulates more than five unexcused absences during a

90. Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73, 90–91 (2006).

91. Soma R. Kedia, *Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 543, 550 (2007).

92. Act of Mar. 8, 1915, 34th Leg., R.S., ch. 49, § 1, 1915 Tex. Gen. Laws 92, 93.

93. *Id.* at 92, 96–97.

94. *Id.*

95. TEX. EDUC. CODE ANN. § 25.082 (West 2006) (detailing the hourly requirements for a school day); TEX. EDUC. CODE ANN. § 25.081 (West 2006) (mandating the numbers of days schools must operate). Some districts may request and be granted a waiver from the Commissioner of Education allowing districts to substitute attendance days for teacher professional development days. TEX. EDUC. CODE § 25.081; *see also* TEX. EDUC. AGENCY, *General Questions* (2003), available at <http://ritter.tea.state.tx.us/legal/general.html>.

96. TEX. EDUC. CODE ANN. § 25.085(a) (West Supp. 2010). The mandatory attendance requirement also extends to children enrolled in kindergarten or prekindergarten. *Id.* at § 25.085(c). *But see* TEX. EDUC. CODE ANN. § 25.086 (West Supp. 2010) (listing exceptions to the compulsory education attendance requirements).

97. *Id.* § 25.092(a). Under this rule, school districts may establish ways for students to make up work or regain credit. *Id.* It does not require that students spend a certain amount of time in an educational setting equal to time missed during regular school hours. *Id.* § 25.092(a–1)–(b).

98. *Id.* § 25.085(e). This requirement is not enforceable against the student's parent under the Texas Education Code §§ 25.093 and 25.094. *Id.* § 25.085(f).

semester, the student's enrollment in school may be revoked.⁹⁹ The Texas Department of Public Safety also requires proof of ninety percent attendance prior to the issuance of a drivers license to students between the ages of sixteen and eighteen.¹⁰⁰

Moreover, school districts must excuse a student for absences resulting from health care appointments and religious holy days.¹⁰¹ School districts have discretion to excuse a student "for temporary absences resulting from any cause acceptable to the teacher, principal, or superintendent of the school."¹⁰² If "one or more of the absences" was excused, or should have been excused by the school, or if the student can prove "by a preponderance of the evidence that the absence . . . was involuntary," an affirmative defense to FTAS or truancy can be established.¹⁰³

Inexplicably, school districts are only required to send a truancy warning notice after the child has been absent enough to trigger a complaint—which is too late to avoid court intervention or diversion.¹⁰⁴ After a warning has been sent to the parent and the parent—under a criminal negligence standard—"fails to require the child to attend school," the parent commits the offense of "Parent Contributing to Truancy."¹⁰⁵ This offense is a Class C misdemeanor punishable by a fine not to exceed \$500.¹⁰⁶ Furthermore, if the student is over eighteen, the parents are not subject to penalties as a result of their child's truancy.¹⁰⁷

A. *Truancy as a Status Offense*

Under the Texas Family Code, truancy is a civil "status" offense that applies only to students under seventeen years of age and is heard in

99. *Id.*

100. TEX. TRANSP. CODE ANN. § 521.3451(a) (West 2007) (giving the Department of Public Safety statutory authority to impose sanctions under the Texas Criminal Procedure Code § 45.050); *accord* 37 TEX. ADMIN. CODE § 15.39(b) (2010) (Tex. Dep't Pub. Safety, Driver License Rules). School districts provide a student with a Verification of Enrollment (VOE) form certifying the student has met the ninety percent attendance requirement. 37 TEX. ADMIN. CODE ANN. § 15.39(b) (West 2010). Municipal and justice courts may impose an indefinite lien (via contempt) on a child's driver license until the child has complied with the order of the court. TEX. TRANSP. CODE ANN. § 521.3451 (West 2007).

101. TEX. EDUC. CODE ANN. § 25.087(b)(1)(A), (b)(2) (West Supp. 2010).

102. *Id.* § 25.087(a).

103. *Id.* § 25.094(f) (West 2006).

104. *Id.* § 25.095(b) (requiring notice be sent to a delinquent student's parents when the child has accumulated three or more unexcused absences during a four-week period in violation of Texas Family Code § 51.03).

105. *Id.* § 25.093(a).

106. TEX. PEN. CODE ANN. § 12.23 (West 2003) (fines for Class C misdemeanors shall not exceed \$500).

107. TEX. CODE CRIM. PROC. art. 45.058 (West Supp. 2010) (defining a child as ten years of age or older and less than seventeen).

juvenile court with procedural protections.¹⁰⁸ Status offenses are not technically criminal, but are offenses if engaged in by an adult would *not* be considered a crime *nor* subject to court sanction.¹⁰⁹ Therefore, it is the status of childhood, in combination with the troubling nature of these actions committed by children, which subjects a child to court review. In all states, truancy is adjudicated as a status offense in a juvenile court where support services may be provided and counsel may be afforded to indigent students.¹¹⁰ Under truancy laws, juvenile courts can order children (and their parents) to comply with compulsory attendance laws under threat of contempt, but children and parents cannot be punished by a fine or jailed for not attending school in and of itself.¹¹¹ As mentioned, it is well documented that students who are habitually truant are likely to drop out of school and vastly reduce economic opportunities throughout his or her lifetime.¹¹² In light of this bleak fact, regularly missing classes is a basis for adjudication as a status offender.¹¹³ However, I contend that court should be the last resort and the underlying issues be addressed in a multi-faceted approach.

B. *How Texas Came to Criminalize Truancy in Texas*

Texas has taken truancy a step further by allowing for the option of criminalizing the status offense of truancy under FTAS. Responding to the fear of the impending increase in juvenile crime, the Texas Legisla-

108. TEX. EDUC. CODE ANN. § 25.094 (West 2006) (FTAS is a status offense); TEX. FAM. CODE ANN. § 51.02(2)(A), (15)(C) (West Supp. 2010) (status offense includes truancy).

109. TEX. FAM. CODE ANN. § 51.02(15) (West Supp. 2010); Nancy Gannon Hornberger, *Improving Outcomes for Status Offenders in the JJDP A Reauthorization*, JUV. & FAM. JUST. TODAY, Summer 2010, at 15–16, available at http://www.juvjustice.org/media/announcements/announcement_link_156.pdf. FTAS under § 25.094 of the Texas Education Code is included as a juvenile status offense. TEX. EDUC. CODE ANN. § 25.094 (West 2006). “Status offenses differ from adjudications of delinquency. Children found guilty of delinquency have committed acts which would be criminal by adult standards.” Erin M. Smith, Note, *In a Child’s Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 LAW & INEQ. 253, 253 n.2 (1992).

110. Cf. TEX. FAM. CODE ANN. § 51.10(c) (West 2008) (providing an indigent juvenile the right to an attorney if the judge orders that the child be detained). However, in Texas, truancy petitions filed in family court have become a defunct practice as a result of the ease and cost-effectiveness of issuing citations under FTAS. Telephone Interview with Ryan Kellus Turner, General Counsel & Director of Education. TMCEC (Oct. 28, 2010).

111. TEX. EDUC. CODE ANN. § 25.095 (West 2006) (allowing school officials to file a complaint against a parent (or anyone standing in parental relation) for “Parent Contributing to Truancy” in either a justice court or municipal court).

112. Soma R. Kedia, *Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 543, 550 (2007).

113. *Id.*

ture instilled a “bite” in truancy laws by adopting a separate criminal offense for truancy under Education Code Chapter 37 in 1995.¹¹⁴ This statute allows for the criminal charge of FTAS.¹¹⁵ Despite exhibiting an identical definition to truancy, FTAS provides for the *criminal* option of filing against an individual under a Class C misdemeanor, which is punishable by a maximum fine of \$500 for each offense¹¹⁶—and once a warning letter has been sent to parents, each day a child is out of school can be a separate offense against the parents.¹¹⁷ Unlike its truancy counterpart, FTAS cases are heard in municipal and justice courts in which sanctions can be similar to delinquency offenses¹¹⁸ and can ultimately translate into jail time for unpaid fines.¹¹⁹ One goal of this legislation was to free up the dockets of juvenile courts to prepare for the incoming wave of violent juvenile super-predators,¹²⁰ but justice and municipal courts are now feeling the backlash.¹²¹ This legislative move to zero tolerance essentially stripped schools of their control over school discipline and conferred ju-

114. TEX. EDUC. CODE § 37 (West 2006) (establishing statutes related to student discipline, law, and order in public schools). Individual school districts have the ability write and enforce additional student disciplinary policies that comply with the statutes. Tex. Educ. Agency, Chapter 37, http://www.tea.state.tx.us/index2.aspx?id=262&menu_id=2147483656 (stating that it is the school district’s responsibility to write discipline policy).

115. TEX. CRIM. PROC. CODE ANN. § 45.054 (West Supp. 2010); TEX. EDUC. CODE ANN. §§ 25.093–25.094 (West 2006).

116. TEX. EDUC. CODE ANN. §§ 25.093–25.096 (West 2006) (detailing Failure to Attend by students and discussing parental consequences for failing to require the student to attend school); TEX. PEN. CODE ANN. § 12.23 (West 2003) (allowing for a maximum fine of \$500 for each offense).

117. TEX. PEN. CODE ANN. § 12.23 (West 2003).

118. TEX. FAM. CODE ANN. § 51.03(a) (West Supp. 2010).

119. *Id.* (allowing for delinquent conduct, including violating a court order by a justice or municipal court, to be punishable by imprisonment by the juvenile court); *see also* TEX. CRIM. PROC. CODE ANN. §§ 45.045 (West Supp. 2010) 45.060(b)–(c) (West 2006) (allowing municipal and justice courts to use *capias pro fine* warrants to enforce judgments against students prior to reaching adulthood).

120. Crime rates were actually decreasing in the early nineties, but public fears surrounding juvenile crime and predictions of the new teenage, increasingly violent, super-predator were emerging. *See* John J. Dilulio, *The Coming of the Super-Predators*, THE WEEKLY STANDARD, November 27, 1995. OJJDP defines these children as “juveniles for whom violence was a way of life—new delinquents unlike youth of past generations.” OFFICE OF JUV. JUST. & DELINQ. PREVENTION, 1999 NAT’L REP. SERIES, JUVENILE JUSTICE BULLETIN: CHALLENGING THE MYTHS, (Feb. 2000), http://www.ncjrs.gov/html/ojjdp/jjbul2000_02_2/chall1.html; *see also* Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children’s Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010) (discussing the super-predator that never came to fruition).

121. TEX. EDUC. CODE ANN. § 25.0951 (West Supp. 2010) (requiring a school district to file a FTAS complaint in justice or municipal courts when a student attains ten or more unexcused absences within a period of six months).

risdiction of school attendance issues to the criminal municipal and justice courts. For the first time in our history, children are subject to accusations of *criminal* offenses for school-related issues, including FTAS.¹²²

Now that Chapter 37 is incorporated into the Education Code, many large independent districts established their own police departments on campus,¹²³ while smaller districts in less populated areas now have school resource officers (SROs) at their disposal¹²⁴ authorized to maintain authority using any lawful means to address illegal conduct, including FTAS violations.¹²⁵ Regrettably, many municipal courts have become mere extensions of the principal's office by entering into interlocal agreements with municipal and justice courts with school districts retaining half of all fines making these courts the preferred venue over juvenile court for attendance issues.¹²⁶ Courts can also order parents to complete community service at the school in which their child attends.

122. *Id.* § 25.094 (West 2006). Other adolescent behaviors such as Disruption of Class, where such a disruption may be nothing more than chewing gum in the class or “emitting noise,” account for a large portion of education related misdemeanor citations. TEX. EDUC. CODE ANN. § 37.124 (West 2006) (defining disruptions to include “emitting noise”). The 2007 Legislature passed House Bill 278 amending the Texas Education Code § 37.102(c) no longer allowing school districts to criminalize every code of conduct violation. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010). However, a sixth grade student was recently cited at Fulmore Middle School in Austin ISD for disruption of class for wearing too much perfume. Andrew Horansky, *Austin Student Says She Was Ticketed for Wearing Too Much Perfume*, KVUE NEWS (posted on Feb. 4, 2011), <http://www.kvue.com/news/Ticket-for-wearing-too-much-perfume—Austin-student-says-yes-115342884.html#>. She has been constantly bullied by a group of girls who said she smelled bad. *Id.* In response, she donned perfume—apparently too much. *Id.* She has not yet appeared in criminal court to defend her disruption of wearing too much perfume and it is unclear if the bullies were cited at all. *Id.*

123. Brian Thevenot, *School District Cops Ticket Thousands of Students*, TEX. TRIB., June 2, 2010, available at <http://www.texastribune.org/texas-education/public-education/school-district-cops-ticket-thousands-of-students>. “The boom in ticket-writing over the last decade or more tracks with the boom in the creation of school district police departments.” *Id.* While only seven school district police departments existed in Texas in 1989, currently there are over 160 police departments designated as school district police departments. *Id.*

124. TEX. EDUC. CODE ANN. § 25.088 (West 2006). Under this section, “a school district may select an attendance officer to enforce the attendance of students.” If an attendance officer is not selected, county peace officers are required to perform the attendance officer duties. *Id.* § 25.090(a).

125. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

126. Interlocal agreements permit a local government to enter into agreements with other public agencies in the interest of cooperatively sharing resources for their mutual

Because the Education Code does not define a Class C misdemeanor, the courts look to the Penal Code definition, which is controlled by the Code of Criminal Procedure.¹²⁷ Under Texas's dual system of juvenile justice, a child failing to regularly attend school can be filed against under truancy in a juvenile court, or alternatively, can be cited and convicted in Texas's "shadow juvenile justice system" for FTAS in a municipal or justice court.¹²⁸ To be clear, "truancy is not a . . . criminal matter in Texas," nor has it ever been,¹²⁹ the same conduct that can be cited as truancy can be made a criminal matter if cited under its counterpart—FTAS.¹³⁰

Under truancy, the juvenile courts maintain an intake process by which cases are weeded out or deferred to juvenile probation officers in an attempt to employ diversionary tactics prior to adjudicating a child delinquent.¹³¹ Significantly, municipal and justice courts lack such a process of review and diversion.¹³² As a result, every citation, whether frivolous or not, must be docketed and heard, further compounding the issues of an

benefit. TEX. GOV'T CODE ANN. § 791.025 (West 2004); see TEX. FAM. CODE ANN. § 51.03(g) (West Supp. 2010); Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

127. TEX. PENAL CODE ANN. § 12.23 (West 2003) (providing for a maximum fine of \$500).

128. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010) (quoting ROBERT O. DAWSON, TEXAS JUVENILE LAW 589 (Tex. Juv. Prob. Comm'n, 7th ed. 2008)).

129. RYAN KELLUS TURNER, PROGRAM ATT'Y & DEPUTY COUNSEL, TEX. MUN. CTS. EDUC. CTR., 15TH ANNUAL JUVENILE LAW CONFERENCE: SCHOOL ATTENDANCE ISSUES IN MUNICIPAL AND JUSTICE COURT 1 (Feb. 28, 2002), <http://www.juvenilelaw.org/Articles/SchoolAttendanceIssues.pdf>. In 2007, the state legislature also clarified that *only* rule violations related to vehicles on school property could constitute a criminal offense. TEX. EDUC. CODE § 37.102 (West 2006); see also Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

130. RYAN KELLUS TURNER, PROGRAM ATT'Y & DEPUTY COUNSEL, TEX. MUN. CTS. EDUC. CTR., 15TH ANNUAL JUVENILE LAW CONFERENCE: SCHOOL ATTENDANCE ISSUES IN MUNICIPAL AND JUSTICE COURT 1 (Feb. 28, 2002), <http://www.juvenilelaw.org/Articles/SchoolAttendanceIssues.pdf>.

131. Prosecuting attorneys in juvenile court are required to review circumstances and the legal sufficiency of allegations. TEX. FAM. CODE ANN. § 53.012 (West Supp. 2010). In FTAS cases, there is no similar provision. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

132. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

already backlogged and ineffective criminal response to truancy.¹³³ Furthermore, children are processed through the municipal and justice court system without the benefit of counsel.¹³⁴

C. School District Authority and Discretion

Section 25.0951 of the Texas Education Code regulates when a complaint or citation filed in juvenile or municipal and justice courts are *discretionary* and when a filing is *mandatory*.¹³⁵ If a student misses three or more days without excuse (or parts of days) during a four-week period, it is *discretionary* as to whether a complaint is filed against the student, the parents, or both.¹³⁶ It is exclusively up to school personnel to decide under which offense, and essentially which penalties will apply, when filing against a student. They may choose truancy, which carries no fines in a juvenile court, or criminal FTAS in which exists distinctly different procedures, greater collateral consequences, and lesser protections.¹³⁷ Additionally, it is notably easier and less expensive for schools to issue citations (tickets) under FTAS as compared to filing a formal complaint under Truancy in a juvenile court, thus ease of use creates another school-based incentive for criminalizing attendance issues.¹³⁸

It is important to understand that a child processed in juvenile court for truancy is afforded counsel at every stage of the process.¹³⁹ Conversely, when this same child is accused of FTAS (a misdemeanor) in a municipal or justice court, he receives no such assurances.¹⁴⁰ In a Class C misdemeanor FTAS case, there is no statutory right to counsel for indigent clients,¹⁴¹ even though the penalties are more severe than in juvenile court

133. See William R. Capps, *The New Face of Truancy*, 60 SCH. ADMIN. 34 (2003), available at 2003 WLNR 13239762.

134. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

135. TEX. EDUC. CODE ANN. § 25.0951(a)–(b) (West 2006) (regulating permissible and mandatory complaints by a school district).

136. *Id.* § 25.0951(b).

137. *Id.* § 25.0951; TEX. FAM. CODE ANN. § 51.03(b)(2) (West Supp. 2010).

138. TEX. EDUC. CODE ANN. § 25.094 (West 2006).

139. TEX. FAM. CODE ANN. § 51.10(a) (West 2008).

140. Ryan Kellus Turner, *The Oversimplification of the Assistance of Counsel in the Adjudication of Class C Misdemeanors*, 18 MUN. CT. REC. 7 (2009), available at <http://www.tmcec.com/public/files/File/The%20Recorder/2009/Recorder%20Vol%2018%20No%203.pdf>.

141. *Id.* (citing *Barcroft v. State*, 881 S.W.2d 838, 841 (Tex. App.—Tyler 1994 no pet.) (holding in a Class C misdemeanor case, there is no statutory right to counsel for indigent clients). “Of the forty-five states that address truancy within juvenile court jurisdiction, thirty-three states provide the right to counsel at all stages of truancy proceedings.” *In re B.A.M.*, 980 S.W.2d 788, 789 (Tex. App.—San Antonio. 1998 pet. denied) (holding

truancy proceedings, i.e., municipal and justice courts can impose significant fines and the consequences flowing from FTAS can be severe.¹⁴²

IV. CLASS C MISDEMEANORS: WHAT'S THE BIG DEAL ANYWAY?

Unlike juvenile courts which are considered civil venues, municipal and justice courts are criminal courts.¹⁴³ As previously stated, the Texas Legislature changed the law in 1991 in a deliberate attempt to label our young people as criminals based on conduct that traditionally was in handled by school administrators with distressing consequences.¹⁴⁴ As a former educator in several Texas public school districts, I can attest to the fact that many educators do not understand the significance of issuing a Class C Misdemeanor citation. Many adults equate Class C misdemeanors with a traffic ticket which can be dismissed by taking a driver education course or may be discharged through payment of a fine.¹⁴⁵ Students charged with a FTAS must appear in a municipal or justice court with the parent and fines can be levied up to \$500 for each day the child was absent in addition to court costs and community service.¹⁴⁶ The financial consequences for families who are already struggling financially can be devastating.¹⁴⁷ Parents may also be required to provide community service to the schools as a condition of a probated sentence requiring them to miss even more work and possibly putting their own jobs in jeopardy.¹⁴⁸ Moreover, half of the fines collected in municipal and justice

juveniles have no right to counsel in Failure to Attend hearings); Motion for Leave to File Amicus Curiae Brief at 3–4, *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009) (No. 83024-0), *available at* <http://www.jlc.org/files/briefs/ES-amicus-12-18-09.pdf>. In January 2009, the Washington State Court of Appeals held that children have a due process right to counsel in at the initial truancy hearing. *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010, 1017 (Wash. Ct. App. 2009) (finding that because “[a] child’s interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing, and she is unable to protect these interests herself,” due process requires the appointment of counsel).

142. TEX. EDUC. CODE ANN. § 25.0951 (West 2006) (detailing school district requirements for filing an attendance complaint); TEX. PEN. CODE § 12.23 (providing for a maximum fine of \$500 per offense).

143. TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 69 (2010), *available at* http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

144. *Id.*

145. *Id.*

146. *Id.* Parents need not be found to have actually contributed or encouraged the child’s truancy. TEX. CODE OF CRIM. PROC., art. 45.057 (West 2006).

147. TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 69 (2010), *available at* http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

148. JIM WALSH ET AL., THE EDUCATOR’S GUIDE TO TEXAS SCHOOL LAW 64 (6th ed. 2005).

courts are remanded to the district, further increasing school districts' incentives for pursuing truancy as FTAS.¹⁴⁹

A. *When a Complaint is Filed*

When a citation is issued for FTAS, the court is required to issue a summons directing the parent and/or person who has custody of the student to appear in person and to bring the student to the hearing which is likely conducted during school hours.¹⁵⁰ If the parent fails to attend the hearing, he or she also commits a Class C misdemeanor offense and can be fined up to \$500.¹⁵¹ In addition, the court may order a student's drivers license suspended for up to a year, require counseling, and impose a variety of other sanctions.¹⁵²

Under both truancy and FTAS, courts have the discretion to suspend sentencing, through a deferred disposition,¹⁵³ while the individual completes the court ordered requirements.¹⁵⁴ If the child completes all of the requirements, a dismissal can be ordered.¹⁵⁵ However, according to a survey conducted by Texas Appleseed, only 12% of cases were actually dismissed.¹⁵⁶ In addition, the municipal and justice courts also have the discretion to reduce the fine, permit installment payments, or waive the fine entirely.¹⁵⁷

149. *Id.*

150. *See* TEX. CRIM. PROC. CODE ANN. art. 45.054(c) (West Supp. 2010).

151. *Id.* art. 45.054(d).

152. *Id.* art. 45.054(a)(2)–(5), (f) (listing allowable programs and requirements that can be imposed upon an individual who is found to have committed a failure to attend offense). Individuals may be required to participate in counseling, attend school without any further unexcused absences, complete community service, and a variety of other programs as deemed necessary by the court. *Id.*

153. *Id.* art. 45.051 (a dispositional order may not exceed 180 days). The court may use its discretion during the deferral period to impose conditions on the defendant. *Id.* art. 45.051(b)

154. TEX. FAM. CODE ANN. § 53.03 (West 2008) (detailing the process for deferred prosecution for a period of six months or less upon a finding that “deferred prosecution would be in the interest of the public and the child”).

155. TEX. CRIM. PROC. CODE ANN. art. 45.051(b) (West Supp. 2010); *see also* TEX. FAM. CODE ANN. § 53.03(h) (West 2008) (providing for deferred prosecution in delinquent conduct or CINS truancy cases). Under this procedure, the court may reset the case to allow the defendant an opportunity to accomplish the terms of the agreement. *Id.* The court may elect to dismiss the proceeding upon compliance. *Id.* However, if the defendant fails to comply with the terms of the agreement, the case may advance to disposition. *Id.*

156. TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 70 (2010), *available at* http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

157. Class Action Complaint at 9, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. July 26, 2010).

B. Parental Responsibility Under the Code

Under § 51.115 of the Family Code and § 25.093 of the Education Code, parents are held accountable for their roles in the child's behavior and are required to attend hearings with their child.¹⁵⁸ In addition to ordering the individual student to attend intervention classes, community service, vocational training, and/or counseling, the municipal or justice court may also order the individual's parent to attend classes for children at risk for dropping out of school or even require the parent to attend school classes with the child.¹⁵⁹ This order can be enforced with further fines and incarceration of the parent.¹⁶⁰ If the parent is convicted of Parent Contributing to Truancy,¹⁶¹ one-half of the fines imposed must be deposited into the operating fund of the school district and the other half deposited into the city's general fund.¹⁶² The court may also order the parent to attend a parenting program to assist in resolving the student's problems.¹⁶³ Punishments in FTAS can vary: a judge can mandate the student perform community service, get tutoring, participate in counseling programs, complete jig-saw puzzles with his or her parents,¹⁶⁴ suspend

158. TEX. FAM. CODE ANN. § 51.115 (West 2008).

159. TEX. EDUC. CODE ANN. § 25.0952 (West 2006) (providing a proceeding in a justice or municipal court based on a complaint of a parent contributing to truancy or under Texas Education Code § 25.094, for failure to attend school).

160. TEX. CODE CRIM. PROC. ANN. § 45.057 (West 2006) (providing a general provision informing the parent of the possibility of being charged with a Class C misdemeanor). Charging parents and removing them "from the home by sending them to jail or putting children in non-secure detention . . . is often counterproductive, because such measures are traumatic for the families, highly cost-ineffective, and often take students out of school." Charles Walls, *New Approaches to Truancy Prevention in Urban Schools*, CYC-ONLINE: READING FOR CHILD AND YOUTH CARE PEOPLE (Feb. 2005), <http://www.cyc-net.org/cyc-online/cycol-0205-eric.html> (last visited Oct. 28, 2010).

161. TEX. EDUC. CODE ANN. § 25.093 (West 2006); see also TEX. FAM. CODE § 51.115 (West 2008).

162. TEX. EDUC. CODE ANN. § 25.093(d)(1) (West 2006)

[A] fine collected under this section shall be deposited as follows: (1) one-half shall be deposited to the credit of the operating fund of, as applicable: (A) the school district in which the child attends school; (B) the open-enrollment charter school the child attends; or (C) the juvenile justice alternative education program that the child has been ordered to attend; and (2) one-half shall be deposited to the credit of: (A) the general fund of the county, if the complaint is filed in the justice court or the constitutional county court; or (B) the general fund of the municipality, if the complaint is filed in municipal court.

Id.

163. TEX. CODE CRIM. PROC. art. 45.054(3) (West Supp. 2010) (allowing for parents to be required to attend classes for reducing truancy).

164. Holly Yan, *Truancy Judge Uses Array of Punishments—Including Jigsaw Puzzles*, DALLAS MORNING NEWS (April 8, 2009), http://www.dallasnews.com/sharedcontent/dws/dn/education/stories/DN-truantpuzzle_08met.ART.State.Edition2.4abc4f5.html.

the student's driver's license for one-year, and force parents to attend a variety of programs as well as face fines and the possibility of secure detention.¹⁶⁵

C. Adult Students

In an attempt to combat the drop-out issue of adult students, the 77th Legislature amended § 25.094 of the Texas Education Code to replace the term "child" with "individual" expanding the reach of the law to allow students who did not previously meet the definition of "child" to be eligible for prosecution under FTAS.¹⁶⁶ In 2007, the Texas Legislature again revised the Texas Education Code to require students who attend or voluntarily enroll in school after their eighteenth birthday to stay for the entire year or face criminal penalties including jail time, fines, and suspension of driver licenses.¹⁶⁷ Individuals between seventeen and twenty-one are now subject to FTAS laws previously reserved only for juveniles. Although the legislature left it up to school districts to adopt the policy, approximately 900 of the 1,030 districts have done so.¹⁶⁸

Students who received citations, sometimes even years prior, are also eligible to receive jail time for unpaid fines once they turn seventeen.¹⁶⁹ A student who turns seventeen and has failed to pay the fines or complete the community service requirements may be issued a Notice of Con-

165. See e.g., TEX. CODE CRIM. PROC. ANN. art. 45.054(c)-(d) (West Supp. 2010) (providing parents are issued summons to appear with the child; upon a failing to do so, the parent commits a Class C misdemeanor and can be fined up to \$500).

166. Act of May 30, 2001, 77th Leg., R.S., ch. 1514, § 4, 2001 Tex. Gen. Laws 5396, 5399 (codified at TEX. EDUC. CODE ANN. § 25.094).

167. Act of April 30, 2007 77th Leg., R.S., ch. 50, § 1, 2007 Tex. Gen. Laws 48, 48 (codified at TEX. EDUC. CODE ANN. § 25.085(e)) (stating that a school district may enact a rule requiring a person who voluntarily enrolls in or attends school after their 18th birthday to attend each school day for the entire period the program of instruction for which the student is enrolled is offered).

168. Forrest Wilder, *School House Crock: Why Texas is Prosecuting Adults for Dropping Out?*, TEX. OBSERVER, March 19, 2010, available at 2010 WLNR 8431883.

169. TEX. CRIM. PROC. CODE ANN. art. 45.045 (West Supp. 2010) (allowing municipal and justice courts to use *capias pro* fine warrants to enforce judgments, in certain circumstances, against individuals who have outstanding judgments incurred prior to reaching adulthood). Courts can wait for the juvenile to reach seventeen before attempting to force compliance. See *id.* (b)(1); see generally RYAN KELLUS TURNER, JUVENILE LAW UPDATE 3 (2003) (on file with author). This practice is known as the "birthday party" and has not yet been expressly prohibited under Texas law. Municipal judges are now expressly authorized to use of the *capias pro* fines for misdemeanants who are juveniles now adults (JNA) provided that courts utilize their contempt authority prior to utilizing a *capias pro* fine. *Id.* Moreover, if upon reaching their seventeenth birthday, the court has made efforts to secure the child's attendance to no avail, the court has authority to issue a warrant for the JNA to be taken into secure custody. CRIM. PROC. art. 45.060(b)-(c), art. 45.045 (West Supp. 2010).

tinuing Obligation to Appear (NCOA).¹⁷⁰ Convictions in a municipal are a matter of public record. In response, the Texas Legislature passed a bill in 2009 requiring the Texas Department of Public Safety to issue nondisclosure orders to keep juvenile offenses from becoming a part of public record.¹⁷¹ In spite of this, these orders are not being issued for a variety of reasons leaving students with criminal records.¹⁷²

D. *Notice of Continuing Obligation to Appear (NCOA)*

At present, Texas is the only state to prosecute adults for school absences and the only state to criminalize a student's failure to attend school. If a charge or charges for FTAS remain pending when a child turns seventeen (a common practice), he or she is issued a Notice of Continuing Obligation to Appear (NCOA)¹⁷³ and can be held in contempt and jailed for unpaid fines.¹⁷⁴ Once a teen reaches seventeen years of age, he or she is considered a legal adult and can be required to appear in court, under threat of contempt, to deal with any unresolved tickets for FTAS prior to turning seventeen.¹⁷⁵ The effect of the current law is that students aged seventeen years and older, who received citations for FTAS several years prior, can be required to pay thousands of dollars in unpaid fines or to spend time in jail, leading an individual to miss even more school or fail or graduate altogether.¹⁷⁶ In many cases, teens and their parents are under the impression that their outstanding fines have been

170. TEX. CODE CRIM. PROC. art. 45.060 (West Supp. 2010).

171. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010).

172. *Id.*

173. TEX. CODE CRIM. PROC. ANN. art. 45.060(b) (West 2006) (ordering the individual's appearance at a designated time, place, and date to answer the charge or charges). Nondisclosure orders (NCOs) are required to be issued on a conviction for FTAS (but not for a CINS truancy violation). TEX. CRIM. PROC. CODE ANN. art. 45.051(c) (West Supp. 2010); see also Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, Presentation at the Special Education Issues and the Juvenile Justice System Course Texas Bar CLE (June 25, 2010). When a child has successfully completed the requirements of a deferred disposition (no conviction) for FTAS, nondisclosure protections are triggered but not always immediately.

174. TEX. CODE CRIM. PROC. ANN. art. 45.050(d) (West 2006) (expressly providing if the individual was placed under court order prior to age seventeen, but still disobeys while the individual was seventeen or older, the court may hold the person in contempt).

175. *Id.* art. 45.050.

176. See Tawnell D. Hobbs, *Dallas Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, Feb. 3, 2009, available at 2009 WLNR 1992915 (describing one judge's proclivity to treat absent juveniles as adults—arresting some and informing others of the difficulty they will face in jail with other, older adults that could be less forgiving than the child's parents).

resolved through community service only to be ordered back to court years later to face more fines and incarceration.¹⁷⁷ Though it was intended that ticketing for FTAS would decrease the drop-out rate, instead, it has in effect caused many to drop out and to stay out.¹⁷⁸

E. *Effects of the Dual Justice Systems on Juveniles*

Rather than serving to combat and diminish the frequency and prevalence of adult dropouts, between 2005 and 2009, school-related attendance charges filed by Texas schools actually *increased* from 85,000 to 120,000—over 40%.¹⁷⁹ Issuing a citation and criminalizing countless students is not serving as an effective deterrent to future truancy. Moreover, minority students are disproportionally represented in this group with 30% of warrants being issued for African-American students and 59% issued for Hispanic students.¹⁸⁰

F. *Municipal and Justice Court vs. Juvenile Court Example*¹⁸¹

Justino gets the “11 day flu” that is running rampant through Houston, Texas. After missing three days of school, his mother takes him to the doctor and the doctor provides a note stating that Justino should not return to school until another nine days has passed (for a total of eight school days). His mother faxes a copy of the note to the school and hears nothing more on the matter. Six weeks later, Justino gets a stomach virus causing him to miss two more days of school. Because he is absent for only two days, his mother does not

177. Class Action Complaint at 20, 27, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010).

178. “Through unnecessarily harsh disciplinary practices, regimented academic approaches to gaining academic credits and progress toward graduation, subtle discouragement about a student’s prospects of success in school, maintenance of an unwelcoming environment, or court-referrals, students often make rational decisions to abandon their education.” Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE FORUM FOR L. & SOC. CHANGE (forthcoming 2011) (footnotes omitted), available at <http://ssrn.com/abstract=1675968>; see generally TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: SCHOOL EXPULSION (2010), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=380&Itemid=.

179. Forrest Wilder, *School House Crock: Why Texas is Prosecuting Adults for Dropping Out?*, TEX. OBSERVER, March 19, 2010, available at 2010 WLNR 8431883.

180. TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 71 (2010) available at http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

181. The comparative hypothetical is based on the examples provided in TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 73 (2010), available at http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

take him to a doctor but provides a note to school asking the absence be excused. Two weeks later, Justino is charged with a Class C misdemeanor for Failure to Attend School and the school contends there are no notes of excuse on file and they refuse to accept documentation so late after the absences.

Justino is required to appear in municipal court with his mother causing her to miss more work. There is no review of the charges against Justino to determine if his case has any merit or if the absences should have been excused. Justino is not appointed counsel and cannot afford one since his mother is a full-time student with little income. Justino and his mother do not know that they can offer evidence that the absences should have been excused and he simply pleads guilty to missing ten days of school. Justino is found guilty, convicted, and sentenced to pay \$500 for each day he was absent and to provide 40 hours of community service. He gets an evening job to help pay off the fines but cannot make enough. Because he is working, he can only complete 38 hours of the required 40 hours of community service and submits the documentation to the court on the due date. He hears nothing more of his case and believes the court has dismissed the charges.

He is subsequently fired because his employer discovers he has a criminal record (because the non-disclosure order is not yet been issued). Furthermore, the college he was hoping to attend denies his application because he "lied" about his criminal history—when in reality he believed it was dismissed and non-disclosure orders had been issued.

While the municipal court could have found him in contempt for not completing the requirements of the order and punt the case to juvenile court, the municipal court waits until he turns seventeen. A NCOA is then issued, but he never receives it and fails to attend the hearing. He is arrested at school for contempt and is randomly sentenced to 10 days in jail with adult offenders. Because of his incarceration, he misses the required state assessment and cannot graduate from high school as anticipated. As a result, he drops out of school altogether and foregoes any hope of attending a university.

Similar to Justino, Ryan misses twelve days of school because of undisclosed illnesses, but instead of being cited for FTAS—he is referred to juvenile court for truancy. The juvenile probation officer reviews his case to determine its merit. The probation officer also determines whether Ryan is eligible for a first offender program or a diversion program. His prosecutor in juvenile court has the discretion to dismiss the case if it is without merit or if the absences should have been excused by the school district. Ryan and his father have

an opportunity to explain the absences and provide documentation. Ryan's case is dismissed. If however, the case were to proceed to court, Ryan would be entitled to an attorney to explain the absences were excused. If the court were to find no merit to his excuse, instead of being convicted of a crime, Ryan would be adjudicated delinquent with the emphasis being on addressing the underlying issues that gave rise to his truancy. Ryan's record will be sealed.

Regrettably, the current legal standards for status offenders are vague and unclear with few procedural guidelines and limited enforcement power. The system provides great discretion to judges, leading to disparate treatment against minorities and ridiculous results in general.¹⁸² Moreover, Texas is the only state to have split the juvenile justice system into two overlapping, but quite different, tracks for essentially the same offense—truancy in family juvenile courts and FTAS misdemeanors in criminal courts.¹⁸³ As demonstrated in the previous example, children cited for FTAS are not afforded the same rights as those facing truancy and delinquency programs and the procedures are less formal in municipal and justice courts with quite different results.¹⁸⁴

182. See generally RUSSELL J. SKIBA ET AL., *THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT* (June 2000) (while the relationship between race and truancy is not well established, the truancy data collected by the juvenile court system reveal that White students are underrepresented in truancy cases).

183. See TEX. FAM. CODE ANN. § 51.08(b) (West Supp. 2010) (detailing Conduct Indicating a Need for Supervision (CINS), including truancy); see also TEX. EDUC. CODE § 25.094 (West 2006) (listing requirements for Failure to Attend).

184. See *In the Matter of B.A.M.*, 980 S.W.2d 788, 789 (Tex. App.—San Antonio 1998) (no pet.) (holding that an indigent juvenile has no right to appointment of counsel in a justice court because incarceration cannot be a direct result of the proceedings). Because a justice court must transfer the case of a juvenile that fails to pay their fine, regardless of the reason, to juvenile court, a referral to the juvenile court for contempt of court presents the first opportunity for the juvenile to make a claim that he failed to pay the fine because of indigency. See *id.*

Although failing to pay the fine in the justice court is an act of contempt of court, a justice court does not have the authority to punish a juvenile for contempt. Instead, the justice court must refer a juvenile who fails to pay a court-ordered fine to the juvenile court for further proceedings.

Id. (citation omitted); accord TEX. CODE CRIM. PROC. art. 45.058(f) (West 2006) (justice and municipal courts may refer a case to the juvenile court when the child is in contempt of a court order).

G. Bootstrapping the Status Offense with Contempt

Bootstrapping is the practice of using contempt powers to elevate charges against juveniles;¹⁸⁵ even though “[t]he juvenile justice system, distinct from the criminal justice system, was created to trade punishment for accountability and to emphasize rehabilitation and treatment of children” rather than sentencing them to jail.¹⁸⁶ Municipal and justice courts *do not* have the authority to make a finding of delinquent conduct and order detention for contempt as these functions are reserved exclusively for the juvenile courts.¹⁸⁷ Municipal court can however, still find a child in contempt of a court order and may proceed under one of two distinct options. First, when a child is found to be in violation of a court order in a municipal or justice court stemming from FTAS, the court may decide to “keep and play” the case, but if it does so its powers are inherently limited to the imposition of a fine up to \$500 for contempt, and the court may choose to bar the child from keeping or obtaining a drivers license indefinitely.¹⁸⁸ If the court does decide to keep jurisdiction and “play” the case, the court cannot then later transfer the case to the juvenile court for a finding of delinquent conduct (contempt) for the same offense.¹⁸⁹ However, if the student turns seventeen while a case is still before the municipal or justice court, the court then has the authority to order incar-

185. Bootstrapping is the “use of the contempt power by juvenile courts to elevate a [child in need of services] into a juvenile delinquent.” Maggie L. Hughey, Note, *Holding a Child in Contempt*, 46 DUKE L.J. 353, 378 (1996) (quoting Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41, 58 (1981)); see also Soma R. Kedia, *Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 543, 559 (2007). In Texas, the process of bootstrapping is codified. See TEX. FAM. CODE ANN. § 51.03. (West Supp. 2010) (allowing for status offenders to be judicially determined to be delinquent in addition to facing penalties as status offenders).

186. Salma Safiedine, *Bad Girls Do Cry: Girls in the Juvenile Justice System, Offenders or Victims?*, JUV. JUST. COMM. NEWSL., July 2010, available at <http://new.abanet.org/sections/criminaljustice/PublicDocuments/jjSafiedine.doc>; Committee Newsletter 1 (July 2010), available at <http://new.abanet.org/sections/criminaljustice/Pages/JJNewsJuly2010.aspx>; see also Sanford J. Fox, *A Contribution to the History of the American Juvenile Court*, 49 JUV. FAM. CT. J. 4 (Fall 1998); Robert E. Shepherd, Jr., *The Juvenile Court at 100: Birthday Cake or Funeral Pyre?* 13-WTR CRIM. JUST., (ABA, Winter 1999).

187. TEX. CODE CRIM. PROC. ANN. art. 45.050 (West 2006) (providing municipal courts will only handle the offense of failure to attend school).

188. Telephone Interview with Ryan Kellus Turner, General Counsel & Director of Education, TMCEC (Oct. 28, 2010). Some courts have taken punishments a step further: “Schools in Dallas and Midland counties have [implemented] electronic monitoring. Former Bexar County Justice of the Peace Linda Penn [also] launched an ankle bracelet program in 2008.” Lynn Brezosky, *Valley JP Creates a Truancy Ruckus*, SAN ANTONIO EXPRESS-NEWS, Aug. 8, 2010, at Metro and State News, available at 2010 WLNR 16011121.

189. TEX. CODE CRIM. PROC. ANN. art. 45.050(c)(1)(2) (West 2006).

ceration for under contempt.¹⁹⁰ Alternatively, the municipal or justice court may refer the individual to juvenile court for a finding delinquent conduct—a separate criminal violation subject to juvenile detention.¹⁹¹ In this instance, the municipal court judge essentially becomes the injured party, or complainant, against a child who has disregarded the court's order.¹⁹² Because judges in a municipal court cannot adjudicate a child as being delinquent, cases are typically transferred to juvenile courts (“punt and pray”) with the hope the juvenile court will take action on the case.¹⁹³

H. *Judicial Indiscretion and Confusion Regarding Texas’ Dueling Systems: The Case of Hidalgo County*

This dual system has created strange and draconian results and, while intended to keep students in school, often it keeps them out. One extreme example of judicial indiscretion and confusion is the case of Hi-

190. *Id.* art. 45.045.

191. TEX. EDUC. CODE ANN. § 25.094(d) (West 2006) (authorizing judges of municipal and justice courts that believe a child has violated a proper court order to find a child in contempt); *see also* TEX. CODE OF CRIM. PROC., art. 45.050 (West 2006).

If the county decides to charge the juvenile with delinquent conduct, the juvenile is afforded the same legal rights as an adult charged with a crime. In certain circumstances, the county can request to have a youth certified as an adult. If such is granted, the person is considered an adult for criminal purposes and will no longer be in the juvenile justice system. The rest of this overview does not apply to persons certified as adults.

If the juvenile is “adjudicated” for delinquent conduct, there are several possible disposition options, or outcomes, as follows:

1. The juvenile may be placed on probation; or
2. The juvenile may be sent to the Texas Youth Commission with an indeterminate sentence (only felony offenses); or
3. The juvenile may be sent to the Texas Youth Commission with a determinate sentence (only certain offenses).

A juvenile who is placed on probation (and not sent to TYC) must be discharged from the probation by the time he or she turns 18.

A juvenile sent to TYC with an indeterminate sentence must be discharged by the time he or she turns 19.

A juvenile sent to TYC with a determinate sentence may be transferred to adult prison depending on his or her behavior and progress in TYC programs.

Overview of the Juvenile Justice System in Texas, TEX. YOUTH COMM’N, <http://www.tyc.state.tx.us/about/overview.html> (last updated Mar. 12, 2009).

192. Telephone Interview with Ryan Kellus Turner, General Counsel & Director of Education, TMCEC (Oct. 28, 2010).

193. TEX. CODE CRIM. PROC. ANN. art. 45.050(b)(1) (West 2006).

dalgo County, mentioned previously.¹⁹⁴ In both cases, Judge Palacios erroneously kept students out of school as a punishment for not attending school and further compounded the issue by ordering the students be confined in an adult justice system with violent adult criminals.¹⁹⁵ Approximately sixty teenagers have served time in jail for unpaid fines in Hidalgo County stemming from FTAS misdemeanors, which were never intended to be punishable by jail time.¹⁹⁶

Francisco De Luna and Elizabeth Diaz are two such individuals.¹⁹⁷ Francisco's father, a barber, died on Christmas Eve, 2004.¹⁹⁸ As a result, his mother began working longer hours as a home health worker.¹⁹⁹ Four months later, Francisco was cited with a "failure to comply" citation for not wanting to learn.²⁰⁰ The school failed to provide any counseling for

194. See generally Class Action Complaint, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010) (hundreds of teenagers were allegedly incarcerated for attendance-related offenses).

195. See *id.* at 29–32.

196. *Id.* at 1–2. Texas is not alone when it comes to inane truancy punishments. The ACLU filed a class action suit in Rhode Island detailing the events that occurred to a young child, Alin. See generally Class Action Complaint, *Boyer v. Jeremiah*, No. 2010-2858 (R.I. Super. Ct. Mar. 29, 2010) (discussing the truancy cases of chronically ill children). Alin was diagnosed with sickle-cell anemia at the age three months old and suffers severe pain as a result. *Id.* at 42. The child had been hospitalized on numerous occasions and has lost consciousness at school due to the intensity of the pain. Under Alin's 504 plan, Alin is not to be punished for absences. *Id.* Even though Rhode Island requires a preliminary investigation of truancy petitions prior to filing, a summons was issued with no such inquiry. *Id.* at 43. The day of the hearing, Alin was too sick to attend court but his mother appeared at the hearing. *Id.* After missing a subsequent hearing, the judge called Alin's mother, while she was in the hospital, but refused to listen to her offer evidence of Alin's medical condition. *Id.* The judge ordered an arrest warrant for Alin (a thirteen year old child). *Id.* at 44. The judge conditioned the warrant on Alin's appearance at school no later than noon the very same day. *Id.* The mother, fearing for her child, rushed Alin to school despite his current condition. *Id.* Not surprisingly, two hours later he was rushed to the hospital via ambulance. *Id.* With the assistance of a public defender, the case was subsequently dismissed. *Id.*

197. Class Action Complaint at 4–5, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010) (identifying Francisco De Luna and Elizabeth Diaz as being sent to Hidalgo County Adult Detention Facility for their inability to pay court fines).

198. *Id.* at 17.

199. *Id.*

200. *Id.*; TEX. EDUC. CODE ANN. § 37.102. (West 2006) (allowing schools to adopt "rules for the safety and welfare of students, employees, and property and other rules [the school] considers necessary"). Failure to comply citations can be issued for chewing gum, dress code violations, and falling asleep in class or any other safety rule adopted by the school board. See *id.* However, House Bill 278 was passed in 2007 and it drastically limited the authority of school districts to criminalize violations of district policies. Act of May 26, 2007, 80th Leg., R.S., ch. 1167, § 1, sec. 37.102, 2007 Tex. Gen. Laws 3998, 3998. As a result, only violations involving the operation and parking of automobiles on a school campus can result in a Class C misdemeanor now. *Id.*

his loss and ignored the fact that he had been diagnosed with an attention disorder in elementary school.²⁰¹ After years of educational neglect and multiple citations, Francisco stopped trying to go to school altogether when he turned seventeen.²⁰² He and his mother, who earned approximately \$18,000 annually, went to Palacios' court several times to address Francisco's school violations.²⁰³ At the conclusion of his last court appearance, Francisco believed that all offenses, including the \$11,140 in fines, had been discharged.²⁰⁴ Palacios' final notice to appear on twenty-three charges went to the wrong address, and Francisco was unaware of the twenty-three warrants that had been issued for his arrest relating to these fines.²⁰⁵ Francisco was later arrested for public intoxication and sentenced to 132 day confinement to discharge his outstanding "status" fines.²⁰⁶

Elizabeth Diaz had been taking numerous medicines for arthritis, osteoporosis and fibromyalgia since she was ten-years-old.²⁰⁷ After age fourteen, more medications were added for attention deficit hyperactivity disorder and bipolar disorder.²⁰⁸ Her mother contends she sent notes that would have excused many of her daughter's absences for medical reasons.²⁰⁹ Furthermore, Elizabeth's mother informed school officials about Elizabeth's conditions, but the school neglected to identify her with a behavior disability or to refer her for special education services in order to meet her educational needs.²¹⁰ Elizabeth also voluntarily committed herself to behavioral health services offered by the school on two occasions.²¹¹ Elizabeth was subsequently ticketed twice in a three month period for FTAS.²¹²

Two years later, when she was ticketed again, she chose to transfer to another school in which both her attendance and academic performance greatly improved.²¹³ Her attendance case was transferred to juvenile

201. Class Action Complaint at 16, 18, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010).

202. *Id.* at 19.

203. *Id.* at 24.

204. *Id.* at 20, 22.

205. *Id.* at 20–21.

206. Class Action Complaint at 21, 23, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010).

207. *Id.* at 25.

208. *Id.*

209. *Id.* at 26.

210. *Id.* at 25.

211. Class Action Complaint at 26, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010).

212. *Id.* at 25.

213. *Id.* at 26.

court (no fine) and she believed she completed the terms of her probation.²¹⁴ When Elizabeth failed to appear at a hearing in municipal court, multiple arrest warrants were prepared in the justice court, including a warrant for a pending FTAS charge from a year prior.²¹⁵ She was subsequently issued a fourth FTAS citation. When she appeared in court for this citation, she was arrested for issues related to the previous citations.²¹⁶ Elizabeth contends she paid off her offenses by performing community service under order of the juvenile court.²¹⁷ Like Francisco, she claims she never received a January 2009 notice to appear.²¹⁸ Additionally, Elizabeth informed the court she could not afford an attorney and yet none was provided.²¹⁹ She spent eighteen days in jail, sharing a cell with women imprisoned for murder, prostitution, and human trafficking.²²⁰ Admittedly, the law provides for alternatives to jail time, including community service and/or payment plans, however, cases such as those of Elizabeth and Francisco demonstrate the failure of municipal and justice courts to exercise their discretion in a reasonable manner.²²¹

When Elizabeth was released from jail, she attempted to return to school.²²² Disturbingly, her enrollment had been revoked for failing to attend classes while she was serving time in jail.²²³ Also while Elizabeth was in jail, she missed the Texas Assessment of Knowledge and Skills (TAKS) test,²²⁴ which Texas requires for graduation.²²⁵ Elizabeth was

214. *Id.* at 27.

215. *Id.* at 28.

216. Class Action Complaint at 28, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010).

217. *Id.* at 27.

218. *See id.* at 28 (failing to appear is authorized for adult prosecution under the Texas Code of Criminal Procedure art. 45.060).

219. Class Action Complaint at 29, 31, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010) (Elizabeth signed an "Explanation/Waiver of Rights and Plea" which the ACLU contends is not a valid waiver of the right to appointed counsel for her inability to pay fines associated with her Failure to Attend charges).

220. *Id.* at 32. The data convincingly outlines the high probability that a young person in an adult facility will become the target of physical and sexual violence and be at higher risk for suicide.

221. In 1983, the Supreme Court held that imprisonment for debt was unconstitutional. *Bearden v. Georgia*, 461 U. S. 660, 668–69 (1983) (finding it possible to be incarcerated for not paying "legal financial obligations" (LFOs) if the debtor possesses the means to pay).

222. Class Action Complaint at 32, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010).

223. *Id.*

224. 19 TEX. ADMIN. CODE, § 101.7(b) (2009) (Tex. Educ. Agency, Testing Req's for Graduation) (students must fulfill testing requirements for graduation).

225. Class Action Complaint at 32, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010).

not allowed to attend school and missed the opportunity to graduate because she was spending time in jail for school attendance issues.

The ACLU asserts that one justice of the peace, Mary Alice Palacios, has an interlocal agreement to split the fines with four school districts in order to pay for the space and staff of Palacios, creating a court extension of the principal's office and an extra incentive for the schools to pursue truancy cases without providing any intervention.²²⁶ Furthermore, the district receives half of all the fines collected. Because of these agreements and the ability of the school district to select which charge, truancy or FTAS, and which specific court a child is referred to, thousands of children have been referred to Palacios' court.²²⁷ This is but one example of how Texas' legislative scheme has gone horribly wrong.

As this case illustrates, very few of the children actually receive the social services they need in order to close the "gateway" to future trouble and crime.²²⁸ If the root problems of student absenteeism are ignored, and truancy orders are issued mandating attendance without support, at risk students will continue to miss school, and continue to violate the truancy orders allegedly designed to encourage school attendance in the first place.²²⁹ This occurs largely because the underlying factors causing the

226. *Id.* at 8 (outlining the gravamen of the ACLU's complaint—in order to generate additional revenue, Judge Palacios engaged in an on-going practice of fining and incarcerating juveniles without providing due process).

227. Class Action Complaint at 7–8, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 27, 2010). Cf. Jeremy Roebuck, *JP Remains Silent a Day After Indictment*, THE MONITOR, July 30, 2010, available at 2010 WLNR 15158296. On July 30, 2010, after being indicted for official oppression for the arrests of Francisco De Luna and Francisco Diaz, Mary Alice Palacios turned herself in. *Justice of the Peace Indicted*, FOX NEWS (July 30, 2010), available at: <http://www.foxrio2.com/justice-of-the-peace-palacios-indicted/>.

A court can order debtors to pay off their fines by serving time in the county jail, where they receive a \$100 credit for each day served. But both teens maintain they were never told they could also work out payment plans or perform community service hours—despite the law's requirement that they be apprised of those options. *Id.* The teens claim they were never told of these options. *Id.* If convicted, Mary Ann Palacios could be sentenced to a year in jail and order to pay a fine of up to \$4,000 for not informing the teens of the alternatives to jail time. *Id.*

228. U.S. DEP'T OF EDUC., MANUAL TO COMBAT TRUANCY 13 (1996), <http://www.eric.ed.gov/PDFS/ED397526.pdf> (stating that truancy can be a gateway to crimes such as burglary and gang activity); see *Truancy Intake Center*, CITY OF TAMPA POLICE DEP'T, http://www.tampagov.net/dept_police/programs_and_services/Truancy_Center/ (linking truancy to drug use, daytime burglary, and vandalism); see also AM. BAR ASS'N, CTR. FOR CHILDREN AND THE LAW, JUV. STATUS OFFENSES FACT SHEET 2, http://www.act4jj.org/media/factsheets/factsheet_17.pdf (truants are more likely to become delinquent).

229. SARA MOGULESCU & HEIDI J. SEGAL, VERA INST. OF JUST. APPROACHES TO TRUANCY PREVENTION, 6 (2002), available at <http://www.ccgpn.org/Resource%20Links/Approaches%20to%20Truancy%20Prevention.pdf> (detailing current responses to truancy in Broward county Florida, the fifth largest school district in the country).

truancy have remained unaddressed. Judges, wishing to preserve judicial authority and integrity, impose steep fines and harsh remedies that only compound the issues.²³⁰ Moreover, students are yoked with boiler-plate court orders to attend school and obey teachers without attempting to address or understand the underlying cause or causes of the individual's truancy, and yet society is confounded by their return.²³¹ Insanity is "doing the same thing over and over again and expecting different results."²³² As can be expected, the child that is placed in the same circumstance will continue to commit the same offense; ultimately being criminalized for it—this is insane. As mentioned earlier, the number of FTAS cases across Texas has skyrocketed, leaving one to imagine how the current system is "working" to eliminate, or even reduce, unexcused absences.²³³

Unfortunately, the circumstances that lead a particular child to commit his or her first status offense often go unaddressed (e.g. unmet special needs or problems at home, including physical and/or sexual abuse), and predictably, the child often commits the same offense again only to be deemed a delinquent and landing in secure detention as a result.²³⁴ Many judges are well-intentioned and are coming up with creative solutions; however, Texas's dual juvenile justice system has robbed school systems of local control allowing schools to deal with their own discipline problems and fails to adequately address the underlying causes for truancy.²³⁵ It has served largely to exacerbate abuses through the use of punitive measures such as confinement and excessive use of disciplinary force.²³⁶

230. See generally Class Action Complaint, *Boyer v. Jeremiah*, No. 2010-2858 (R.I. Super. Ct. Mar. 29, 2010) (adjudicating students with serious medical conditions such as kidney disease and sickle-cell anemia as "truant").

231. For a typical boiler-plate truancy complaint, see http://www.co.grayson.tx.us/Juvenile/Documents/Truancy/Truancy_Orders-Failure_to_Attend_School.pdf. For a typical FTAS complaint, see http://www.co.collin.tx.us/justices_peace/forms/truancy_complaint_form.pdf.

232. JOHN DRYDEN, *SPANISH FRIAR*, act 2, sc. 1.

233. Tawnell D. Hobbs, *Dallas Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, FEB. 3, 2009, available at 2009 WLNR 1992915.

234. See generally Class Action Complaint, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 26, 2010); *ACLU of Texas Sues Hidalgo County, Challenges "Debtor's Prison" for Truant Teens*, AM. CIVIL LIBERTIES UNION OF TEX. (July 27, 2010), <http://www.aclutx.org/2010/07/27/place-holder-headline-4/> (alleging hundreds of students were incarcerated as a result of FTAS-related citations).

235. SARA MOGULESCU & GASPAR CARO, *VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 2* (Dec. 2008).

236. See ACLU, WASHINGTON LEGISLATIVE OFFICE, *ACLU SUPPORTS S. 678, THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION REAUTHORIZATION ACT OF 2009*, at 2

V. EFFECTIVE NON-LITIGATION STRATEGIES FOR SCHOOL DISTRICTS, EDUCATORS, AND THE COURTS

A. *No Child Left Behind and IDEA*

The first step in the school-based truancy process should begin with a referral by the parent or school personnel to the school-based truancy support team when a child misses a predetermined amount of school (e.g. three days). Although I agree with historian Henry Steele Commager, who observed in 1951 that “[no] other people ever demanded so much of schools and of education as have the Americans,”²³⁷ truancy is squarely a school issue and the courts should only be utilized as a last resort, not the first line of defense. The No Child Left Behind Act (NCLB)²³⁸ was specifically enacted to improve the academic achievement and outcomes of disadvantaged youth and to ensure that “no child is left behind.”²³⁹ So why then should we extend a criminal incarceration approach to status offenses such as school attendance, when we now “recognize the limitations of adolescents and, therefore, restrict their privileges to vote, serve on a jury, consume alcohol, marry, enter into contracts, and even watch movies with mature content”?²⁴⁰ Despite the fact that children may look like adults, appearances may be deceiving: “[j]ust because they’re physically mature, they may not appreciate the consequences or weigh information the same way as adults do. So we may be mistaken if we think that [although] somebody looks physically mature, their brain may in fact not be mature.”²⁴¹

Research indicates that children and families in crisis require a faster response than courts are able to offer and that “juvenile justice systems are often ill-equipped to provide the services these youth and families need.”²⁴² Currently, Texas schools are not required to attempt any interventions before citing a child for FTAS even though they are best

(Dec. 9, 2009), http://www.aclu.org/files/assets/ACLU_Letter_in_Support_of_S_678_the_Juvenile_Justice_and_Delinquency_Prevention_Reauthorization_Act_of_2009.pdf.

237. Henry Steele Commager, Editorial, *Our Schools Have Kept Us Free*, LIFE, Oct. 16, 1950, at 46.

238. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6578 (2006).

239. *Id.* § 6301.

240. AM. BAR ASS’N, JUV. JUST. CTR, CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 1, available at <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>.

241. *Id.* at 2 (quoting Interview with Jay Giedd, Neuroscientist, National Institute of Mental Health, on PBS Frontline).

242. SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 2 (Dec. 2008) (highlighting successful reforms that utilize a customizable approach to status offenders).

equipped to do so.²⁴³ Research further indicates that school districts that have a truancy intervention plan are more effective at reducing truancy.²⁴⁴ There is no single cause for school truancy; multidimensional features are involved and an assessment and intervention plan should be developed for the child prior to court referral and intervention. Children are unwilling to attend schools for a plethora of reasons, including violence in the schools, inadequate school services, low academic efficacy, improper placement, educational neglect, mental disorders, and social circumstance.²⁴⁵ Scared straight approaches that are utilized by the courts through intimidation and fear simply do not work in most situations, but are particularly ineffective in truancy cases.²⁴⁶

Isolating and criminalizing children for truancy is a philosophy geared toward punishment rather than prevention, which sends us back to the early 1800s. Highly punitive programs, though well-intentioned, do nothing to reduce truancy rates.²⁴⁷ What's more, zero-tolerance policies have succeeded primarily in further alienating of students from school rather than to increase student learning, engagement, and attendance.²⁴⁸ Criminalizing children for FTAS generates direct and collateral consequences including fines, involuntary service, incarceration, recidivism and school drop-out.²⁴⁹ While children and parents need to be accountable and understand that there are real consequences to chronic absenteeism, school personnel, the legislature, and judges must realize that reducing

243. Schools are required to send notices and meet with parents. This would require the elimination of the mandatory filing after 10 days so that the school would have opportunity to provide adequate interventions.

244. MICHELLE DECKER GERRARD ET. AL., WILDER RESEARCH CTR., EFFECTIVE TRUANCY INTERVENTION AND PREVENTION: A REVIEW OF RELEVANT RESEARCH FOR THE HENNEPIN COUNTY SCHOOL SUCCESS PROJECT 5 (Aug. 2003), available at <http://www.wilder.org/download.0.html?report=759>.

245. DEBBIE BLUE & JENNIFER E. COOK, HIGH SCHOOL DROPOUTS: CAN WE REVERSE THE STAGNATION IN SCHOOL GRADUATION? 4-7 (May 2004), <http://www.edb.utexas.edu/hsns/HSNSbrief2.pdf>; see also CHRISTOPHER LUND, WHY ARE STUDENTS DROPPING OUT OF SCHOOL? THE FACTORS THAT CONTRIBUTE TO THE UNITED STATES HIGH SCHOOL DROPOUT RATE (Dec. 10, 2009), available at <http://www.unh.edu/sociology/media/Podcasts/ChristopherLund.pdf>.

246. See Marcia Johnson, *Texas Revised Juvenile Justice and Education Codes: Not All Change is Good*, 19 J. Juv. L. 1, 23 (1998) (discussing the ill-effects of scared straight programs such as boot camp).

247. *Id.* (stating punitive programs are least effective for rehabilitation of juvenile offenders).

248. See *id.* at 18-19.

249. See Class Action Complaint at 25, *De Luna v. Hidalgo County*, No. 7:10-CV-00268 (S.D. Tex. filed July 26, 2010); *ACLU of Texas Sues Hidalgo County, Challenges "Debtor's Prison" for Truant Teens*, AM. CIVIL LIBERTIES UNION OF TEX. (July 27, 2010), <http://www.aclutx.org/2010/07/27/place-holder-headline-4/> (both students suffered severe collateral consequences for being cited by FTAS).

truancy is best served with preventive measures that address the underlying issues.²⁵⁰

Schools have a vested interest in keeping the students in school. Texas schools receive funding based on average daily attendance (ADA).²⁵¹ Likewise, NCLB has placed an increased emphasis on attendance because it may be used as an additional indicator for Adequate Yearly Progress (AYP).²⁵² NCLB requires national standards of accountability and requires an *individualization* of education for all students.²⁵³ Under this individualization of education rationale in which each student's individual needs are addressed, the Texas Legislature should require schools to exhaust a variety of intervening "steps" modeled after the special education process under the Individuals with Disabilities Education Act (IDEA)²⁵⁴ (or § 504 of the Rehabilitation Act)²⁵⁵ prior to issuing a citation for FTAS. Schools have systems in place to deal with difficult behaviors and

250. North East Independent School District's ACE is acclaimed for being the paramount alternative school in Texas. The Academy has helped nearly 3,000 formerly-designated dropouts succeed and graduate since 1991. NATIONAL DROPOUT PREVENTION, 2006 Crystal Star Award Recipients, *available at* [HTTP://WWW.DROPOUTPREVENTION.ORG/CRYSTAL-STAR-AWARDS/2006-CRYSTAL-STAR-AWARD-RECIPIENTS](http://www.droputprevention.org/crystal-star-awards/2006-crystal-star-award-recipients).

251. *See generally* TEX. EDUC. CODE ANN. § 42.005 (West 2006) (discussing and defining ADA). ADA is how the state determines aid to school districts by averaging attendance at the schools. Currently, Texas counts students in attendance each day and averages the attendance count over the year. The figure is used to calculate the amount of money the school will receive from state funding. *School Funding 101, Glossary*, COALITION TO INVEST IN TEXAS SCHOOLS, <http://www.investintexaschools.org/schoolfunding/glossary.php>.

252. *See* Gilbert Bradshaw, *Must Utah Imprison Its Parents and Children?: Alternatives to Utah's Compulsory Attendance Laws*, 22 BYU J. PUB. L. 229, 238–39 (2007) (discussing reporting requirements for attendance under NCLB).

253. U.S. DEP'T OF EDUC., EXECUTIVE SUMMARY OF THE NO CHILD LEFT BEHIND ACT OF 2001, <http://www2.ed.gov/nclb/overview/intro/execsumm.html> (last modified Feb. 10, 2004).

The NCLB Act . . . strengthen[s] Title I accountability by requiring States to implement statewide accountability systems covering all public schools and students. These systems must be based on challenging State standards in reading and mathematics, annual testing for all students in grades 3–8, and annual statewide progress objectives ensuring that all groups of students reach proficiency within 12 years.

Id.

254. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2006). President Barack Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA) on February 17, 2009, including \$12.2 billion in additional funds. *American Recovery and Reinvestment Act of 2009: IDEA Recovery Funds for Services to Children and Youths with Disabilities*, U.S. DEP'T. OF EDUC., <http://www.ed.gov/policy/gen/leg/recovery/factsheet/idea.html>.

255. 29 U.S.C. § 794 (2006) (prohibiting discrimination against persons with disabilities). Section 504 states that "[n]o . . . qualified individual with a disability in the United States . . . shall . . . be excluded from [,] . . . denied the benefits of, or be subjected to

disabilities.²⁵⁶ Using, modifying, and enforcing these existing systems would serve to address the underlying issues of children struggling to attend school. Such practices would also serve as a deterrent to the oversimplified ability to hand out citations and defer school attendance issues to the judicial system; often times even after the child has accumulated significant absences.

As research has shown, many truants are suffering from emotional and/or learning disabilities;²⁵⁷ so, this individualized approach serves a dual purpose by addressing the truancy behavior and targeting discovery of its underlying causes before it is too late.²⁵⁸ Once a truancy diversion meeting is held, a child should be evaluated within a reasonable time, not only to discover the social/emotional causes of truancy, but to discover any underlying disabilities. The evaluation results would then drive the educational and social decisions for the child to include referrals to community services and educational interventions.

If students are found eligible for service under IDEA, the collaborative team develops an individualized education plan (IEP).²⁵⁹ If the child does not qualify under IDEA, an individualized truancy plan should be developed in similar fashion to an IEP and based on the individual needs of the child. Similar to the processes delineated under IDEA, once a plan is developed, a meeting should be held with all of the key stakeholders,

discrimination under" any program or activity that receives Federal financial assistance. *Id.*

256. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2006); *see also* TEX. EDUC. CODE ANN. § 28.0212 (West 2006) (requiring districts to identify educational goals for the student including diagnostic information, provide intensive instruction, include the parent in the process, and provide innovative methods including flexible scheduling alternative learning environments, and other interventions as needed).

257. PETER W. D. WRIGHT, *READING PROBLEMS AND DELINQUENCY* (1974), *available at* <http://www.wrightslaw.com/info/jj.delinq.read.probs.htm>; *see also* Susan Kramer, *Truancy and Learning Disabilities*, BELLAONLINE (2011), <http://www.bellaonline.com/articles/art28393.asp>.

258. The Bexar County Juvenile Probation Office noticed that more than one-half of all court referrals to the county's juvenile justice system were stemming from school police officers. TEX. APPLESEED, *TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS* 61 (2010), *available at* http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf (discussing the need for specialized training for school-based police officers). Many of the children being referred were suffering from mental health disorders. *Id.* In an attempt to reduce the number of school based referrals, they created the Children's Crisis Intervention Training for school police officers with the focus being on diverting students with mental health disorders into treatment and not the juvenile justice system. *Id.*

259. Individuals with Disabilities Education Act (IDEA) (2004), 34 C.F.R. §§ 300.320–300.32 (requiring, if the child's behavior impedes learning, the IEP team to address, review, and revise the child's IEP, to ensure the child receives appropriate behavioral support); *see also* 34 C.F.R. § 300.520.

including the school's counselor or social worker, the school attendance officer, administration, parents, and any other key resources. During the meeting, the child's needs and interventions are discussed with the child and family, at which time the family begins receiving services and supports. Under this framework, the child's progress and success can be frequently measured and adjustments made as necessary.²⁶⁰

Many children struggling with attendance have poor impulse and behavior control.²⁶¹ Another tool defined under IDEA for children with behavioral issues is known as a Behavioral Intervention Plan (BIP) which takes observations of the student and synthesizes a plan of action.²⁶² Educators and school personnel are legally required to follow the BIP plan and the consequences of not doing so fall squarely on the school district and not on the student.²⁶³ "However, as with so many provisions of IDEA, this may take a lot of vigilance, advocacy, and battling by parents to make sure that" all stakeholders are actively and effectively involved in implementing interventions, but the long-term benefits can be significant.²⁶⁴

B. *The Personal Graduation Plan*

It is well established that truancy indicates a child is at risk of dropping out of school. Texas has an existing system in place to address the individual needs of children who are deemed at-risk of not graduating high school and should be required to include children who are habitually truant. In an effort to keep students from dropping out of high school, Personal Graduation Plans (PGPs) are triggered by (1) failing the TAKS assessment, or (2) by children who are not on track to graduate on time.²⁶⁵ These plans must include methods that include "flexible scheduling, alternative learning environments, on-line instruction, and other in-

260. For a simple overview of the special education process, see generally NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES, *10 Basic Steps in Special Education*, <http://www.nichcy.org/EducateChildren/Steps/Pages/default.aspx>.

261. See generally RICH NAUERT, *Teen ADHD Linked to Delayed High School Graduation*, Pysch Central (reviewed by John M. Grohol, Psy.D. on July 28, 2010), <http://psychcentral.com/news/2010/07/28/teen-adhd-linked-to-delayed-high-school-graduation/16108.html> (citing symptoms of students with conduct disorders include truancy and dropping out of school altogether).

262. 20 U.S.C. § 1414(d)(3)(B) (2006) (providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children).

263. Terri Mauro, *Behavioral Intervention Plan*, ABOUT.COM, <http://specialchildren.about.com/od/behavioranddiscipline/g/BIP.htm>.

264. *Id.*

265. TEX. EDUC. CODE ANN. § 28.0212 (West Supp. 2010).

terventions.”²⁶⁶ These plans, if implemented correctly and enforced, provide opportunity to personalize educational experiences and effectively reduce truancy. Texas should take advantage of the PGP system and special education processes that are already in place for at-risk students to include truancy-related issues. Including truancy as an at-risk indicator should be an essential component of such existing systems. The Texas legislature should return school discipline issues to the school and require schools to include sincere and comprehensive truancy interventions through these already existing systems. Such implementation must be a mandatory precursor to filing against the child for truancy or FTAS instead of relying mandating reliance on an over-burdened, ill-equipped judicial system to handle educational matters.

C. *Alternatives to Court Processing of Juveniles: Survey of Model Programs*

It seems bizarre to punish a child for being out of school by keeping him out of school. Schools must be the first to not only identify a child's attendance patterns and notify the parents, but schools must attempt interventions that take into account the child's environmental factors prior to filing a complaint.²⁶⁷ In order to effectively combat the truancy issues we face today, we must create and maintain: (1) early prevention programs at the elementary school level;²⁶⁸ (2) programs that will assist students who are at risk for being referred to the court system; and (3) programs for students who have already been adjudicated as truant or convicted under FTAS and are at risk for further punitive actions.

Rather than continue to create a permanent criminal class, the OJJDP supports evidence-based programs that effectively deal with chronic truancy.²⁶⁹ The common elements of these programs include parental involvement, community involvement, meaningful sanctions for non-compliance, effective school-based truancy intervention programs, sys-

266. REGION XIII EDUC. SERV. CTR. ET. AL., PERSONAL GRADUATION PLAN: RESOURCE GUIDE AND MODEL 2 (Oct. 2003).

267. SARA MOGULESCU & HEIDI J. SEGAL, APPROACHES TO TRUANCY PREVENTION, VERA INST'T. OF JUST. 4 (2002), available at <http://www.ccgpn.org/Resource%20Links/Approaches%20to%20Truancy%20Prevention.pdf>.

268. *Id.*

269. See generally OFFICE OF JUV. JUST. & DELINQ. PREVENTION, OJJDP MODEL PROGRAMS GUIDE, <http://www.ojjdp.gov/mpg/progTypesTruancy.aspx> (last visited October 20, 2010) (breaking down a wide range of juvenile truancy statistics and examining empirical data-based solutions); Martell L. Teasley, *Absenteeism and Truancy: Risk, Protection, and Best Practice Implications for School Social Workers*, CHILD. & SCH., April 1, 2004, at 117, available at 2004 WLNR 11510966.

tematic data collection and evaluations, and community education.²⁷⁰ One such program, the Abolish Chronic Truancy (ACT) Now Program in Tucson, Arizona exemplifies this approach to truancy by: (1) holding parents and children accountable; (2) providing diversion intervention programs that address the underlying causes of truancy; and (3) sanctions for parents and children who do not complete the intervention program.²⁷¹ When a student accumulates three unexcused absences, he or she is referred to the ACT Now Program with a deferred court date as an additional incentive to participate.²⁷²

D. *Supporting Families in Crisis: Legislative Reform in Connecticut*²⁷³

Connecticut has legislatively reformed their approach to dealing with status offenders by eliminating secure detention as an option for a status offense and *requiring* deferral to community-based services.²⁷⁴ More specifically, Connecticut requires a mandatory diversion for all initial status offenses in order to provide opportunity and services to treat underlying issues and keep children from being labeled criminal or delinquent.²⁷⁵ Diversion services include *immediate* contact with the family in crisis, intervention, case management, counseling, mediation, and advocacy.²⁷⁶ Only after all other resources are exhausted are children referred to juvenile court,²⁷⁷ “[w]here entry into the court system may do more harm than good—leading them deeper into the justice system.”²⁷⁸ In addition to funding research and evaluation regarding status offenders, the Connecticut legislature allocated \$2 million to fund the diversion programs in the state’s most populated districts.²⁷⁹

270. Martell L. Teasley, *Absenteeism and Truancy: Risk, Protection, and Best Practice Implications for School Social Workers*, CHILD. & SCH., April 1, 2004, at 117, available at 2004 WLNR 11510966.

271. *Id.*

272. *Id.*

273. The American Bar Association, Criminal Justice Section has published its own list of model programs. See AM. BAR ASS’N, MODEL TRUANCY PREVENTION PROGRAMS (Nov. 29, 2010), available at www.abanet.org/crimjust/juvjus/truancy/prevention/programs.doc.

274. SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 3, 10 (Dec. 2008).

275. *Id.* at 10.

276. *Id.*

277. *Id.* at 11.

278. AMER. BAR ASS’N, COMMISSION ON YOUTH AT RISK & COMMISSION ON HOMELESSNESS AND POVERTY JUDICIAL DIVISION: REPORT TO HOUSE OF DELEGATES 7 (Aug. 2010), available at www.abanet.org/leadership/2010/annual/docs/109a.doc.

279. SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 12 (Dec. 2008).

Early reports indicate a decline in status offense court referrals of 41% in Connecticut, while referrals in Texas increased by 40%.²⁸⁰ In essence, the system in Connecticut is working because it decriminalizes status offenses and is treating status offenders in non-punitive and supportive ways. The common thread of many successful programs that they each offer immediate, family-centered services making juvenile courts the last resort—not the first. The effectiveness of these approaches begs for the creation of legislative schemes in Texas that decriminalize attendance issues, impose basic rights of due process and counsel in all juvenile proceedings, and provide effective diversion services to address the underlying causes of truancy.²⁸¹

E. *Early Intervention Programs*

Early intervention programs recognize that parents are typically responsible for young children's FTAS and the focus is on intervention for parents.²⁸² One such program, The Truancy Prevention Through Mediation Program in Ohio invites parents to a mediation session.²⁸³ During the mediation, underlying causes are discussed and referrals to community resources are provided. If the agreement is subsequently violated, the parents are invited back for a second mediation. If the habitual absenteeism continues, parents (not students) are referred to the court system as a last resort, in which fines and detention may be implemented.²⁸⁴ Once a complaint is filed, the case is "fast-tracked" and scheduled for a court date within a month.²⁸⁵

F. *Reforming the Court, Supporting the Child*

Florida also utilizes an early intervention program for young children. In Florida, truants are adjudicated as Children in Need of Services

280. *Id.*

281. Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE FORUM FOR L. & SOC. CHANGE (forthcoming 2011), available at <http://ssrn.com/abstract=1675968>; see also AM. BAR. ASS'N, COMMISSION ON YOUTH AT RISK AND COMMISSION ON HOMELESSNESS AND POVERTY, REPORT TO THE HOUSE OF DELEGATES 1-4 (2008), available at <http://www.abanet.org/youthatrisk/reports.pdf>. A leading criminal law scholar has identified the "diversionary" function of the juvenile court as a singular achievement in reducing the incarceration of youth. Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2479 (2000).

282. SARA MOGULESCU & HEIDI J. SEGAL, VERA INST. OF JUST., APPROACHES TO TRUANCY PREVENTION, 4 (2002), available at <http://www.ccgpn.org/Resource%20Links/Approaches%20to%20Truancy%20Prevention.pdf>.

283. *Id.* at 4-5.

284. *Id.* at 8 (the cost of hiring a neutral mediator and providing substitute teachers is minimal compared to traditional court system responses).

285. *Id.* at 5.

(CINS).²⁸⁶ Before a child can be qualified as CINS, the family must have attempted to correct the underlying issues through the Families in Need of Services (FINS) system.²⁸⁷ Florida first turns to a group of non-profit organizations to provide a comprehensive approach to status offenders.²⁸⁸ The goal is simple: keep families out of the courthouse.²⁸⁹ All services provided under these systems are privatized and contracted, but are still managed by the Florida Department of Juvenile Justice (DJJ).²⁹⁰ The process with FINS providers begins immediately after a referral has been made to the service provider either by a school, law enforcement, or the families themselves and immediate services are offered based on the unique family needs and circumstances.²⁹¹ If the initial services are insufficient, the child is referred to a juvenile court to qualify as a CINS in which a judge can order treatment or secure shelter.²⁹² Notably, only 6% of FINS cases under this scheme are adjudicated as CINS.²⁹³

To promote accountability and evaluate effectiveness, the network of providers is required to collect comprehensive data and aggregate, analyze, and publish its statistics which are published in an annual report by the DJJ.²⁹⁴ Participating providers must demonstrate that at least ninety percent of the children served are not arrested while they are receiving services. Shouldn't this be the goal for Texas? As of 2006, more than ninety percent have remained crime free six months after exiting the pro-

286. SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 3 (Dec. 2008). In Texas, CINS includes truancy, FTAS, and other status offenses. CINS includes offenses that constitute: the violation of a state penal law of the grade of misdemeanor punishable by fine only; truancy; single instance of public intoxication; the violation of a school district's previously communicated written standards of student conduct for which the child has been expelled; the violation of a child at-risk court order issued under § 264.305 of the Family Code; or Failure to Attend school under § 25.094 of the Education Code (only applies to counties with a population of less than 100,000). TEX. FAM. CODE ANN. § 51.03(b) (West Supp. 2010) (exhaustively listing conduct indicating a need for supervision).

287. SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 3 (Dec. 2008) (detailing the approaches used in Florida to keep children out of the court system for status offenses).

288. *Id.* (highlighting successful reforms that utilize a customizable approach to status offenders).

289. *Id.*

290. *Id.* at 4 (discussing the initial processes of the program).

291. *Id.*

292. SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS 4 (Dec. 2008).

293. *Id.*

294. *Id.*

gram.²⁹⁵ Not only is this system working to keep children out of the court system, but it saved the state approximately \$37.2 million to \$37 million in 1997–1998 alone.²⁹⁶

Effective truancy programs address the issues in a collaborative and multi-agency manner.²⁹⁷ The Broward Truancy Intervention Program in Broward County, Florida, tracks student absences through the use of a computer system and notifies children's parents of the absences before it becomes a serious issue.²⁹⁸ A parent is sent a warning letter after three unexcused absences.²⁹⁹ If a student misses ten days, the assistant state attorney, the parents, a social worker, and a school administrator meet at the police department.³⁰⁰ During this meeting, causes and consequences are discussed and the parent is referred to social services to assist in achieving a solution to the underlying causes.³⁰¹ Only if these services fail, are subsequent actions including filing misdemeanor charges against the parent employed.³⁰² Even so, of the thousands of cases of truancy in a three-year span, only 160 charges were filed against parents.³⁰³ In stark contrast, according to information reported to the Texas Education Agency, DISD filed 750 cases against parents for "contributing to truancy" in 2008 alone—up from 79 cases in 2005.³⁰⁴

In Clayton County, Georgia, stakeholders including educators and juvenile justice systems, drafted a cooperative agreement limiting the number of school-based referrals to the court system.³⁰⁵ Under this

295. *Id.* at 4–5.

296. *Id.* at 5–6 (demonstrating that diversion programs not only benefit the child, but the state as well).

297. SARA MOGULESCU & HEIDI J. SEGAL, VERA INST. OF JUST., *APPROACHES TO TRUANCY PREVENTION* 3 (2002), available at <http://www.ccgpn.org/Resource%20Links/Approaches%20to%20Truancy%20Prevention.pdf> (listing the factors of effective truancy intervention and prevention programs yielding financially "tenable" outcomes and "achieving better social outcomes for troubled youth").

298. *Id.* at 6.

299. *Id.*

300. *Id.*

301. *Id.*

302. SARA MOGULESCU & HEIDI J. SEGAL, VERA INST. OF JUST., *APPROACHES TO TRUANCY PREVENTION* 6 (2002), available at <http://www.ccgpn.org/Resource%20Links/Approaches%20to%20Truancy%20Prevention.pdf>.

303. *Id.*

304. Tawnell D. Hobbs, *Dallas Parents with Truant Kids Taught a Lesson*, DALLAS MORNING NEWS, FEB. 3, 2009, available at 2009 WLNR 1992915.

305. TEX. APPLESEED, *TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS* 68 (2010), available at http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf (citing *Stop the Schoolhouse to Jailhouse Track*, Clayton County, Georgia, ADVANCEMENT PROJECT available at <http://www.stopschoolsto jails.org/clayton-county-georgia.html>).

agreement, school-based misdemeanors do not result in an automatic citation unless the student commits his or her third offense during the same school year. Students receive warnings for their first offense and referral to school based programs after the second offense. Because of the success of this program in not only reducing citations, but in reducing actual offenses on school grounds, other states have begun to implement similar graduated sanction plans.

VI. CONCLUSION

Truancy is a result of numerous factors including emotional, familial and environmental causes.³⁰⁶ There are a variety of program models that are proven effective in reducing truancy and are cost-effective, and keep children in school and out of the criminal justice system.³⁰⁷ Applying the principle that truancy is often a result of many issues, the Texas Legislature must eliminate entirely the ability to criminalize typical adolescent behavior by removing the FTAS statute. In the absence of such measures, the ability to cite a student for FTAS should be aggressively curtailed by requiring school districts to prove that intensive intervention strategies failed prior to citing a child for attendance issues. Absent the elimination of the FTAS statute, citations should only be issued as a last resort when mandatory diversionary measures fail. If Texas must criminalize school attendance, it must restrict "the ability of school systems to file truancy petitions in court . . . [so] the responsibility for addressing a student's needs will fall squarely on the system best equipped to handle this complicated task."³⁰⁸

At a minimum, school districts should be required to employ a variety of intervention strategies prior to filing for FTAS to include: (1) conducting an informational meeting on the laws and legal consequences regarding truancy; (2) using existing systems such as the IEP, BIP, and PGP processes to collaborate with school representatives to create an attendance contract that includes intervention and educational and social ser-

306. For a discussion on the positive effects of mentoring, service-learning, alternative schooling, and after school opportunities, see generally JAY SMINK & MARY S. REIMER, NAT'L DROP-OUT PREVENTION CTR/NETWORK, FIFTEEN EFFECTIVE STRATEGIES FOR IMPROVING STUDENT ATTENDANCE AND TRUANCY PREVENTION, (2005), available at <http://www.eric.ed.gov/PDFS/ED485683.pdf>.

307. See SARA MOGULESCU & GASPAR CARO, VERA INST. OF JUST., MAKING COURT THE LAST RESORT: A NEW FOCUS FOR SUPPORTING FAMILIES IN CRISIS (Dec. 2008) (detailing many aspects of effective model programs designed to reduce truancy).

308. Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE FORUM FOR L. & SOC. CHANGE (forthcoming 2011), available at <http://ssrn.com/abstract=1675968> (discussing how curtailing the use of juvenile courts can more appropriately apportion the burden on the interested parties instead of the judiciary).

vices;³⁰⁹ (3) provide multi-agency and multi-faceted social support; (4) report the number of citations issued to include the age, gender, and race/ethnicity of the truant; and (5) develop engaging and relevant curriculum for all students.³¹⁰ Finally, the Texas Legislature should additionally mandate that schools districts be prohibited from receiving any revenue from any FTAS citations, or enter into interlocal agreements, but rather require districts to use intervention programs on a “continuum of increasingly intensive interagency participation” prior to any court involvement regarding school attendance issues.³¹¹

In the event that such school-based interventions have failed and a subsequent citation has been issued for FTAS, judges should be trained and encouraged to issue effective interagency alternatives to the standard court sanction of fines.³¹² Texas’s courts must look to effective models that specifically target the individual needs of each child and tailor them

309. School representatives should include counselors, court staff, parents, and students.

310. While beyond the limited scope of this Comment, I would be remiss not to mention effective curriculum is a vital component of an effective school system and should seek to ensure that time spent in the classroom is engaging, meaningful, and relevant. Taking this as an approach to truancy would focus individual student support services around motivating students to learn while simultaneously providing engaging opportunities in the classroom for all students. Research has shown that as the disconnect grows between students and schools, the likelihood that a student will disengage and drop out of school altogether rises. NORTH CENT. REG’L EDUC. LAB., *Understanding and Addressing the Issue of the High School Dropout Age*, <http://www.ncrel.org/policy/pubs/html/second/forms.htm#engaging>. One example of engaging curriculum is service-learning as it “connects meaningful community service experiences with academic learning, personal growth, and civic responsibility. It can be a powerful vehicle for effective school reform at all grade levels.” NAT’L DROPOUT PREVENTION CTR/NETWORK, *Service Learning*, <http://www.dropoutprevention.org/effective-strategies/service-learning> (LAST VISITED DEC. 20, 2010); see also JAY SMINK & MARY S. REIMER, NAT’L DROPOUT PREVENTION CTR/NETWORK, *FIFTEEN EFFECTIVE STRATEGIES FOR IMPROVING STUDENT ATTENDANCE AND TRUANCY PREVENTION* (2005), available at <http://www.eric.ed.gov/PDFS/ED485683.pdf>.

311. Charles Walls, *New Approaches to Truancy Prevention in Urban Schools*, CYC-ONLINE: READING FOR CHILD AND YOUTH CARE PEOPLE (Feb. 2005), <http://www.cyc-net.org/cyc-online/cycol-0205-eric.html> (last visited Oct. 28, 2010); see Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE FORUM FOR L. & SOC. CHANGE (forthcoming 2011), available at <http://ssrn.com/abstract=1675968> (discussing recommended methods of intervention to deal with truancy, with juvenile court being a last resort). Utah law currently requires an administrator to meet regularly with the habitually truant child, but also to adjust curriculum and school schedules in order to meet the child’s needs. Gilbert Bradshaw, *Must Utah Imprison Its Parents and Children?: Alternatives to Utah’s Compulsory Attendance Laws*, 22 BYU J. PUB. L. 229, 231 (2007).

312. Charles Walls, *New Approaches to Truancy Prevention in Urban Schools*, CYC-ONLINE: READING FOR CHILD AND YOUTH CARE PEOPLE (Feb. 2005), <http://www.cyc-net.org/cyc-online/cycol-0205-eric.html> (last visited Oct. 28, 2010).

to fit the needs of both the community and the individual before them.³¹³ Texas' courts must look to effective models that specifically target the individual needs of each child and tailor them to fit the needs of both the community and the individual before them; working on three main beliefs:

(1) because truancy often emerges from family conditions, the courts identify and treat the underlying causes in the family; (2) because it is more productive to keep students in the school setting, the courts hold weekly mock court sessions on school premises and put families in regular contact with the judge; (3) because many people give up on truants, the court uses positive reinforcement of the participants' efforts, regardless of their failings.³¹⁴

While it is clear that there is no one-size-fits-all approach to accommodate the needs of every school and every child, it is necessary for Texas to evaluate the aforementioned programs and begin to integrate such approaches into our unique dual system of juvenile justice, instead of jumping to criminalize students through attendance citations. The payoffs of improvements for communities, families, schools, children, and the courts far outweigh the long-term consequences and the price of continuing the status-quo.

313. For an interesting court-to-school approach, see Charles Walls, *New Approaches to Truancy Prevention in Urban Schools*, CYC-ONLINE: READING FOR CHILD AND YOUTH CARE PEOPLE (Feb. 2005), <http://www.cyc-net.org/cyc-online/cycol-0205-eric.html> (last visited Oct. 28, 2010). Some innovative courts are bringing the system directly to the schools in a non-punitive manner to better address the attendance issues. *Id.*

314. *Id.*

